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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, requires participating States and local school districts to provide educational services to children whose mental incapacity renders them unable to benefit from such services.

2. Whether a State's obligations under the Education for All Handicapped Children Act may be significantly expanded by transforming "related services"—such as physical and occupational therapy—into educational services, which are entitled to far broader statutory coverage.



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TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

The Rochester, New Hampshire, School District seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 875 F.2d 954, and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The opinion of the United States District Court for the District of New Hampshire is reported at 1987-88 Education for Handicapped Law Reporter ("EHLR") 559:480 (1988), and is reprinted at Pet. App. 40a. The opinion of the New Hampshire Department of Education

Hearing Officer is reported at 1987-88 EHLR 509:141 (1987), and is reprinted at Pet. App. 60a.

JURISDICTION

The court of appeals entered judgment on May 24, 1989, and denied petitioner's motion for rehearing and suggestion for rehearing *en banc* on June 30, 1989. These orders are set forth at Pet. App. 64a and 65a respectively. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are the Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, and the New Hampshire Special Education Act, N.H. Rev. Stat. Ann. § 186-C. They are set forth at Pet. App. 67a and 182a respectively.

STATEMENT

This case involves a thirteen year old child who is so mentally disabled that he is incapable of learning even the most rudimentary skill. Respondent Timothy W. was born two months prematurely and weighed four pounds. Immediately after birth, he began to suffer from severe respiratory and brain disorders, necessitating long-term hospitalization. These problems caused extreme brain damage, leaving Timothy with "virtually no cortical tissue." App. II, 188.¹ Consequently, Timothy has consist-

¹ "App." cites are to the appendix filed in the court of appeals. The quotation in text is from a report of an X-ray taken when Timothy was six months old. The report goes on to explain that "[c]ortical tissue is brain tissue of the cerebral hemisphere; that is, tissue above the brain stem and spinal cord. . . . [The] brain stem regulates reflex activity, both motor as well as vegetative functions, including breathing and cardiac regulation. . . . The cortical hemispheres basically are responsible for all the learned skills that develop after the newborn period." App. II, 188.

ently exhibited profound mental and developmental retardation, deafness and blindness, a persistent convulsive disorder and severe cerebral palsy. He is virtually immobile, suffers from spasticity and has contracted joints, dislocated hips and scoliosis.

From the time he was a year old, Timothy received extensive governmental services, including physical and occupational therapy and sensory stimulation. Until he was four and a half, he attended a day program for severely and profoundly retarded children at the Rochester Child Development Center. Despite these early efforts, however, Timothy's doctors concluded that he "has no potential for development of self-care functions and has no educational potential." App. IV, 762. "All but the bottom of [his] brain ha[s] been destroyed by hydrocephalus. Timmy functions as a reflex individual." App. IV, 784. Based on these professional opinions, when petitioner evaluated Timothy in early 1980, it concluded that he had no learning capacity and that he was therefore ineligible for educational services under the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1400 *et seq.*, a federal-state program in which New Hampshire participates.

In the following years, Timothy continued to receive a variety of services, including medical care, physical therapy, tactile stimulation and eating therapy, pursuant to the provisions of the Disabled Children's Program of the Social Security Act, 42 U.S.C. § 1382 *et seq.* Still he made no progress, continuing to demonstrate virtually "no volitional movement." App. IV, 812. Nevertheless, in 1983, Timothy's mother, assisted by counsel, renewed her efforts to get special education services for her son. Petitioner responded by requesting that Timothy submit to a comprehensive evaluation to determine whether his condition had improved since his last evaluation in 1980. When his mother refused, petitioner again concluded that Timothy was ineligible for educational services under the

EAHCA because, on the basis of the available information, he was determined to be incapable of benefiting from educational services.

Timothy filed the instant lawsuit on November 17, 1984, seeking injunctive relief and \$175,000 in damages. After denying a motion for a preliminary injunction,² the district court decided to abstain pending exhaustion of Timothy's administrative remedies under the EAHCA. During the next several years, Timothy received a large number of diagnostic tests and educational assessments, which confirmed that he is incapable of any meaningful learning. A specialist in pediatric neurology, for example, determined that Timothy suffered "extreme brain atrophy," with constant seizures on one side of his brain and little or no activity on the other side. She concluded that "the potential for learning with such a degree of central nervous system damage is practically nonexistent." App. II, 192-96; App. IV, 900, 1028-31, 1053. A report by an occupational therapist similarly stated that "[n]o cortical reflexes or reactions could be elicited." App. III, 520-21. In addition, Timothy was also receiving extensive educational services at this time, but evidenced no capacity to respond to these efforts. See pp. 5-6 *infra*.³

On October 14, 1987, the state administrative hearing officer ruled that Timothy qualified for educational serv-

² The court premised this ruling on the fact that Timothy had received a substantial settlement in a malpractice action and thus would not be irreparably harmed absent an injunction since he could afford to purchase the services in question and seek reimbursement thereafter.

³ The New Hampshire Department of Education, acting on a complaint filed by Timothy in 1984, had ordered petitioner to conduct an evaluation and, as part of the process, to provide Timothy with interim educational services designed to assess his need for special education. App. IV, 874. Petitioner has provided an educational program since 1985 that significantly exceeded the requirements set out by the Department.

ices under the EAHCA and its state counterpart, N.H. Rev. Stat. Ann. § 186-C (Supp. 1988). Despite the voluminous factual record before him, the hearing officer rested his decision on a legal ground, concluding that all handicapped children, regardless of whether they are "capable of benefiting from special education," must be provided with such services. Pet. App. 60a. Petitioner appealed this decision by filing a counterclaim in the instant action.

On July 15, 1988, after conducting a two day trial limited to the issue of Timothy's ability to benefit from educational services, the district court granted summary judgment for petitioner. First, it held that the EAHCA does not require States to provide an education to a child who cannot benefit from it. Relying on the rationale of this Court's decision in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), the court concluded that "Congress would not legislate futility!" Pet. App. 47a.⁴ Turning next to the question of plaintiff's eligibility, the district court reviewed the factual record in detail. In addition to considering the detailed medical and educational information going back to Timothy's birth, and viewing a videotape of his activities, the court also heard the testimony of several experts who were directly involved in his care. For example, the Executive Director of the Stafford Center where Timothy had then been receiving full-time educational services for fifteen months testified that, based on careful observation and data analysis, it was her conclusion that he had made no progress and continued to perform at a reflex level. App. II, 245-62. Similarly, Timothy's program supervisor at the Center, while

⁴ The district court also held that N.H. Rev. Stat. Ann. § 186-C was intended to implement the State's participation in the EAHCA and that, therefore, it did not call for services beyond those required by federal law. Pet. App. 49a-51a. The court of appeals later agreed with this interpretation of state law, but reached a different conclusion as to its substance since it had taken a contrary view of the scope of the EAHCA. Pet. App. 39a.

stating her belief that all children are educable, nevertheless testified that Timothy had made no progress even on the most fundamental skills: *e.g.*, reaching five centimeters for a toy or turning his head leftward in a darkened room toward a large light box. In fact, during his fifteen months at the Center, Timothy had evidenced volitional movements only twice, by lifting his arm toward a music box. App. II, 329-401. Based on this record, the district court came "to the regrettable conclusion that Timothy W. is not capable of benefiting from special education." Pet. App. 57a.⁵

The Court of Appeals for the First Circuit reversed, holding that the district court had misconstrued the scope of the EAHCA. It placed primary reliance on the fact that the EAHCA "is permeated with the words 'all handicapped children' whenever it refers to the target population." Pet. App. 12a (emphasis in original). The court also stressed that the statute contains a priority for "*children . . . with the most severe handicaps.*" Pet. App. 11a (emphasis in original) (quoting 20 U.S.C. § 1412 (3)). These provisions, according to the First Circuit, demonstrate that the "plain language" of the Act "mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might attain." Pet. App. 12a.⁶ The court of appeals also went on to rule that the concept of "education for the severely handicapped under the Act is to be broadly defined," indicating that services like "occupational

⁵ The court further held that its ruling does not "obviate an opportunity to [receive] such education indefinitely. This child must be subject to continuous, but periodic evaluations, intended to identify any development which illustrates a capability to benefit from special education." Pet. App. 57a-58a.

⁶ The court found additional support for this view in the EAHCA's legislative history and in several judicial opinions that had mentioned the issue in *dicta*.

tional and physical therapy are to be considered educational services." Pet. App. 33a, 34a.⁷

REASONS FOR GRANTING THE WRIT

The court of appeals has incorrectly decided an important question of national law affecting the delicate area of federal-state relations. Its decision threatens to divert scarce governmental resources—financial and human—away from children who are able to benefit from educational services in order to have them expended on children who, unfortunately, are incapable of being helped by such services. In reaching its conclusion, moreover, the court stretched the definition of "education" beyond recognition by including services such as physical and occupational therapy. This aspect of its ruling is likely to have important consequences that go well beyond the circumstances of the instant case because it will require

⁷ In view of these legal conclusions, the court purported not to rule on Timothy's challenge to the district court's factual finding that he was uneducable. Its opinion, however, presents the evidence in a completely contrary manner by misstating the record, citing to any inference that might suggest that Timothy was educable, and explaining away or ignoring expert opinions that disagreed with such a view. For example, the court attempts to discredit the testimony of Dr. Andrews—upon whom the district court had placed heavy reliance—by stating that "[h]er only contact with Timothy had been during an evaluation when he was two months old," Pet. App. 5a, when, in fact, Dr. Andrews testified that she had been involved in Timothy's care for years and had seen him three times in the fourteen months prior to trial. App. II, 180-83. Similarly, the court refers to the testimony of another doctor who had "recommended the establishment of an educational program for Timothy which emphasized physical therapy and stimulation," Pet. App. 2a, but fails to mention the same doctor's repeated testimony that Timothy is incapable of benefiting from special education, even if that concept is broadly defined to include basic self-care skills, App. IV, 763, 783-84, 787. Because this kind of distorted factual presentation was so pervasive, we think that the court below violated the spirit, if not the letter, of this Court's ruling in *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985) (factual findings cannot be reversed unless clearly erroneous).

local school districts to pay for a new range of costly services for numerous handicapped children who are covered by the EAHCA. In view of its significance, the case merits review by this Court.

1. The primary issue presented by this case is both important and recurring. The EAHCA is one of the major federal-state-local government service programs in this country, with all fifty States currently participating. Enacted in 1975, the statute sets out substantive and procedural rules governing the provision of special educational services to handicapped children, and provides federal financial assistance to participating States. The overwhelming proportion of the money required to carry out the statute's mandates, however, is paid by state governments and local school districts. *See, e.g., Pittenger & Kuriloff, Educating the Handicapped: Reforming a Radical Law*, 66 *The Public Interest* 72, 86-89 (Winter 1981) (federal government pays about six percent of average per pupil cost under the EAHCA).

With the costs of special education rising substantially, one of the pressing concerns of local school districts has been whether they must continue to provide educational services even when it becomes painfully obvious that a particular child is incapable of benefiting from them. This issue has arisen with increasing frequency in recent years, as school districts have come to realize, through repeated failed attempts, that certain children are uneducable. There have been at least ten cases before administrative hearing officers dealing with the issue, most of which have held that if a child is incapable of benefiting from educational services he or she is not covered by the EAHCA.⁸ And, although the numbers are some-

⁸ For the majority view, *see Christopher C. v. Weston Pub. Schools*, 1987-88 EHLR 509:154 (Mass. 1987); Case No. SE-53-81, 1984-85 EHLR 506:239 (Ill. 1984); Case No. 10571, 3 EHLR 502:315 (N.Y. 1981); *Nashua School Dist. v. James O'C.* (N.H. 1986) (App. VII, 1472); *X. v. Laconia School Dist.* (N.H. 1981)

what speculative, it would appear that there are several thousand children in this country who are so lacking in physical brain capacity that they are unable to learn even the most basic self-care skills. See generally Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 Neb. L. Rev. 586, 608-12 (1982) (citing authorities concerning non-educability).⁹ Pursuant to the holding of the court below, these children must receive educational and related services under the EAHCA from the time they are three until they reach their twenty-first birthday. 20 U.S.C. § 1412(2)(B).

The services in question typically are very expensive. Children who are uneducable are obviously extremely difficult to work with and require constant care and attention. In the instant case, for example, the "educational" program for Timothy currently costs approximately \$15,000 per year, App. IV, 1066-67, which is about five times the average per pupil cost of educating non-handicapped children in New Hampshire. The federal government contributes less than \$300 to this \$15,000 expense. App. I, 132. The remainder must be paid out of state and local education budgets, which are already strained to, if not beyond, the breaking point. These dollars, in other words, could profitably be spent on children who can benefit from education.¹⁰

(App. VII, 1473); *LeClerc v. Milan School Dist.* (N.H. 1981) (App. VII, 1480). In addition to the hearing officer in this case, three others have reached a contrary decision. See *Contra Costa County Consortium*, 1985-86 EHLR 507:300 (Cal. 1985); *School Dist. of the Menomonee Area v. Rachel W.*, 1983-84 EHLR 505:220 (Wisc. 1982); *In re Keith J.*, 3 EHLR 502:271 (Ga. 1981).

⁹ According to expert testimony in this case, there are approximately fifteen children out of New Hampshire's one million citizens who appear to be incapable of functioning beyond a reflex level. App. II, 219. If the same ratio were to apply nationwide, the number of children in question would be between three and four thousand.

¹⁰ In addition to the cost of educational services, school districts must also pay for "related services" under the EAHCA. 20 U.S.C.

There are also less tangible, but perhaps even more important, costs at issue in this case. By insisting that an education be provided to children who are uneducable, the court below places unrealistic demands on teachers and classrooms. Frustration and burnout are already enormous problems among teachers in general and special education teachers in particular. See, e.g., *Teacher Burnout* (A. Alschuler, ed., NEA 1980). These problems are made much worse by asking teachers to devote endless hours to children who are unable to show any sign of improvement. The court of appeals' decision likewise may have unfortunate consequences for families of uneducable children because it raises false hopes, which in turn often lead to bitterness and disillusionment.

Collectively, these various costs are sufficiently grave that, before the federal courts require that they be borne by state governments and local school districts, this Court should ensure that Congress unmistakably intended such a result.

2. The decision below is not only important, it is also wrong. Simply as a matter of common sense it seems inconceivable that Congress would insist that the States provide costly educational services to a child who "is afflicted by such extreme handicap(s) that the child is not capable of benefitting from special education." Pet. App. 49a. As the district court put it, "[s]urely, Con-

§ 1401(a)(18). Although not the case for Timothy, typically for children who function at his level those services include the full cost of a residential placement. See, e.g., *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir.), cert. denied, 473 U.S. 906 (1985); *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983). See also 34 C.F.R. § 300.302. The cost of such residential services can readily be three or four times the cost of the educational services, often making the total cost between fifty and eighty thousand dollars for a single child. See generally *The Directory for Exceptional Children* (11th ed. 1987-88).

gress would not legislate futility!" A careful reading of the statute confirms this common-sense view.¹¹

The court of appeals purported to rely on the "plain language" of the EAHCA, finding its repeated mandate—"all handicapped children [must] have available to them . . . a free appropriate public education"—to be virtually conclusive on the issue. Pet. App. 10a (emphasis in original) (quoting 20 U.S.C. § 1400(c)). See also 20 U.S.C. §§ 1400(b)(8), 1412(1), 1412(2)(A). There are two distinct reasons, however, why this language cannot properly be read to require an education for children who are incapable of learning.

To begin with, the term "handicapped children"—i.e., those who are covered by the statute—is expressly limited to people "who by reason [of a specified disability] *require* special education and related services." 20 U.S.C. § 1401(a)(1) (emphasis supplied).¹² This definitional limitation is reflected throughout the statute, making clear that participating States must cover only those children "who are in *need* of special education." 20

¹¹ The court of appeals mischaracterized petitioner's position as claiming the authority to "*unilaterally exclud[e]* certain handicapped children . . . on the ground that they are uneducable." Pet. App. 38a (emphasis supplied). But petitioner argued—and the district court held—only that a school board should have the opportunity to show that a particular individual cannot, in fact, benefit from educational services. That determination, of course, would be subject to the comprehensive administrative and judicial process that Congress has established under the EAHCA. See 20 U.S.C. §§ 1412(2)(c), 1414(a)(1)(A), 1415, 1417(b); 34 C.F.R. §§ 300.5(a), 300.500-534.

¹² This section provides in full:

The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

U.S.C. §§ 1412(2)(C), 1414(a)(1)(A) (emphasis supplied). The regulations further emphasize this point, stating that “[t]he definition of ‘special education’ is a particularly important one . . . since *a child is not handicapped unless he or she needs special education.*” 34 C.F.R. § 300.14, Comment 1 (emphasis supplied). See also 34 C.F.R. § 300.5(a). Thus, by limiting children who are eligible for services under the EAHCA to those who “need” or “require” special education, Congress has defined “all handicapped children” to mean something less than the term might appear to suggest at first blush.¹³ In particular, people who cannot benefit from such services plainly do not need or require them.¹⁴

Second, a proper understanding of what it is that the EAHCA guarantees to eligible individuals—i.e., “a free appropriate public education”—also demonstrates that children who cannot benefit from educational services are not covered. This Court has previously held that “[i]mplicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child.” *Board of Educ. v. Rowley*, supra, 458 U.S. at 200 (emphasis supplied). Although *Rowley*

¹³ By contrast, Congress has defined the term “handicapped individual” under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 706(7), significantly more broadly to include “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”

¹⁴ The First Circuit also relied on the priority given under the EAHCA for “*handicapped children . . . with the most severe handicaps.*” Pet. App. 11a (emphasis in original) (quoting 20 U.S.C. § 1412(3)). But this provision does not eliminate the antecedent condition imposed by the definition of handicapped children—i.e., that the child “require” special education in the first place. Only if a child meets that threshold does the priority for “severity of handicap” come into play.

established a minimum level of services that must be provided for an education to satisfy the EAHCA, its view of "appropriateness" remains fully applicable in the present circumstances; *i.e.*, an education is not appropriate if the child simply is incapable of benefiting from it. See *Parks v. Pavkovic*, 753 F.2d 1397, 1405 (7th Cir.), *cert. denied*, 473 U.S. 906 (1985) (this position is "implicit" in *Rowley*). Indeed, this "benefit" requirement is expressly reflected in the statute itself, which limits the provision of "related services" to those that will "assist a handicapped child to *benefit* from special education." *Board of Educ. v. Rowley*, *supra*, 458 U.S. at 201 (emphasis in original) (quoting 20 U.S.C. § 1401 (a) (17)). In short, here as in *Rowley*, "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education." 458 U.S. at 200-01.¹⁵

Thus, contrary to the plain language interpretation relied on by the First Circuit, when the EAHCA is read as a whole, it becomes clear that children who are incapable of benefiting from special education do not come within its coverage. Moreover, to the extent that the court attempted to shore up its conclusion by relying on legisla-

¹⁵ *Rowley*'s requirement that the education provided to handicapped children must "be sufficient to confer some educational benefit" demonstrates just how unworkable the decision below is likely to be. Petitioner is now charged with the responsibility of providing services that will confer some educational benefit on a child who is incapable of being benefited. As each year's educational program shows this to be the case, it can be expected that greater and greater demands will be imposed on petitioner in what is destined to be a futile effort to meet its obligation under *Rowley*. The school district, in other words, will be left without any objective standard for determining the level of services that it must provide, an outcome which *Rowley* explicitly condemns. 458 U.S. at 190 n.11.

tive history, its effort was equally misguided.¹⁶ In the first place, most of the materials it cites simply repeat the references to "all handicapped children" and to the priority for those with "the most severe handicaps." Pet. App. 18a-22a. As previously noted, however, these requirements are specifically limited by the definition of "handicapped children" that is contained in the statute itself. See pp. 11-12 *supra*. More significantly, at no point does the court cite any legislative history indicating that Congress expressly intended to require the States to provide educational services to children who cannot benefit from them.¹⁷ In the absence of that kind of legislative

¹⁶ The court's reliance on administrative and judicial decisions is likewise unhelpful. Inexplicably, it cited only those administrative decisions that favored its position, even though they were clearly a "minority" view. See note 8 *supra*. Similarly, the court quoted supporting *dicta* from other courts while ignoring contrary *dicta*. See, e.g., *Matthews v. Campbell*, 3 EHRLR 551:264 (E.D. Va. 1979). Indeed, in an attempt to distinguish a clearly inconsistent Seventh Circuit opinion, the court intentionally omitted a key factual predicate that renders its distinction untenable. Thus, it quotes the Seventh Circuit to the effect that an argument suggesting that "persons as severely retarded as [plaintiff] . . . are uneducable" would not be "*likely to succeed*." Pet. App. at 32a (emphasis in original) (quoting *Parks v. Pavkovic*, *supra*, 753 F.2d at 1406). But the Seventh Circuit made clear—in words immediately following those with which the court below ended its quote—that it was speaking of children who function at a mental level of "*3-6 years old*." 753 F.2d at 1406 (emphasis supplied). In this case, by contrast, we are dealing with a child who functions at the level of a newborn infant. App. II, 250-52, 382-85; App. IV, 891, 959. Timothy is thus in the very different situation discussed by the Seventh Circuit (but ignored by the court below): *i.e.*, "he could not benefit from special education no matter how expensive." 753 F.2d at 1405.

¹⁷ The court attempts to suggest otherwise by quoting a Senate Report which states that "[t]he Committee recognizes that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." Pet. App. 23a (emphasis in original) (quoting S. Rep. No. 168, 94th Cong. at 11 (1975)). But this quotation

clarity, there is no basis for imposing such a requirement on participating States. As this Court has previously explained, because the EAHCA was enacted pursuant to congressional spending powers, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Board of Educ. v. Rowley*, *supra*, 458 U.S. at 204-05 n.26 (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).¹⁸

In sum, the illogical result reached below—that Congress intended States to provide costly educational services to children who are unable to benefit from them—is simply not compelled by the language of the statute. Far from it, that language, read in its entirety, demon-

has been wrenched completely out of context. It came about in response to concerns expressed during committee hearings that the EAHCA's requirement of an individualized educational plan would be perceived as creating an enforceable contract and thus make school districts potentially liable for non-performance. It was in this regard that the Committee made the statement quoted by the court of appeals, emphasizing that "[i]t is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship." S. Rep. No. 168, 94th Cong. at 11 (1975). *See also* 34 C.F.R. § 300.349 and Comment thereto. The Senate Report had nothing to say about whether Congress intended the States to provide educational services to children who were shown to be incapable of learning.

¹⁸ The Court elaborated on this basic point only last Term in an analogous area of federalism:

Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is "unmistakably clear" in the language of the statute, recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile . . .

Dellmuth v. Muth, 109 S. Ct. 2397, 2401 (1989). *See also Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989) (same requirement for a clear congressional statement in spending power cases as in Eleventh Amendment cases).

strates that Congress intended coverage only for those children who, regardless of their handicaps, stood to receive at least some benefit from special education.¹⁹

3. This case merits review for another reason as well. In addition to expanding the category of people who are covered by the EAHCA, the court of appeals also enlarged the scope of services that must be provided thereunder. Specifically, the court ruled that "education is broadly defined [under the statute]," and includes such services as "physical therapy" and "occupational therapy." Pet. App. 33a-34a.²⁰ This view of educational services is directly at odds with the statutory provision defining physical therapy and occupational therapy as "related services," which is a category that is separate and distinct from "special education." See 20 U.S.C. §§ 1401 (a) (17), (18). The distinction between these two categories is particularly significant, moreover, because coverage for special education under the EAHCA is much more comprehensive than is coverage for related services.

¹⁹ Even the First Circuit, perhaps without recognizing the fact, seemed unprepared to apply its inflexible interpretation of the EAHCA faithfully. Thus, it criticized the district court for having relied on *Parks v. Pavkovic*, *supra*, where the Seventh Circuit had discussed a child in a coma and indicated that he would not be covered under the EAHCA "since the child would be completely uneducable in his condition—since he could not benefit from special education no matter how expensive." 753 F.2d at 1405. Aside from noting that this discussion was *dictum*, the court below distinguished the case on the ground that plaintiff in the present case "is not in a coma, and does respond to stimuli and his environment." Pet. App. 32a. But the distinction would be irrelevant if the court truly meant to rule that all severely disabled children—regardless of whether they possibly could benefit from educational services—must receive them under the EAHCA. A child in a coma is certainly "handicapped" as that term was interpreted by the First Circuit.

²⁰ The court evidenced this aspect of its decision by citing to a variety of cases and inserting parentheticals indicating that particular types of services are to be considered "educational."

See Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984). The First Circuit's decision to eliminate this distinction, therefore, is likely to increase the burdens on state governments and local school districts by requiring them to provide additional non-educational services to numerous handicapped children.²¹

One of the most fundamental distinctions under the EAHCA is between the two components of a "free appropriate public education"—i.e., "special education," on the one hand, and "related services," on the other. 20 U.S.C. § 1401(a)(18). Special education must be provided to all individuals who are covered by the EAHCA, which at this point is in excess of four million handicapped children. *See* U.S. Dep't of Education, Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act 95 (1987). Once eligible for special education, moreover, a student is also entitled to receive "related services," which are "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and [diagnostic] medical and counseling services) . . ." 20 U.S.C. § 1401(a)(17). In contrast to special education, however, "related services" need be provided only "*as may be required to assist a handi-*

²¹ The court's reason for reaching this issue—other than the fact that respondent needs the non-educational services that the court included within its definition of education—is not altogether clear from its opinion. At one point, it suggests that the district court took too narrow a view of educational services. Pet. App. 34a. While we believe that a fair reading of the district court's opinion demonstrates the contrary, if the court of appeals were correct that the lower court had used too narrow a definition of education in determining whether respondent was educable, that, of course, would have been a sufficient basis to reverse the ruling of the district court. The court of appeals never suggested, however, that its decision on the definition of education was an independent basis for reversal. If it had, as we show in text, it would have been incorrect on that ground as well.

capped child to benefit from special education.” Ibid. (emphasis supplied).

This limitation on the services that are provided under the EAHCA has generated a significant amount of litigation. See cases cited at Pet. App. 33a-34a. See also *McNair v. Oak Hills Local School Dist.*, 872 F.2d 153 (6th Cir. 1984); *Doe v. Anrig*, 651 F. Supp. 424 (D. Mass. 1987); *Detsel v. Board of Educ.*, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff’d* 820 F.2d 587 (2d Cir.), *cert. denied*, 108 S.Ct. 495 (1987); *Seals v. Loftis*, 614 F. Supp. 302 (E.D. Tenn. 1985). Many of the children covered by the statute plainly need services like counseling, psychological therapy, physical therapy, speech therapy or occupational therapy. Families and advocates thus have an obvious incentive to attempt to bring these services within the scope of the EAHCA. The consequent pressure on school districts to cover the costs of all services needed by a handicapped child—either through a broad definition of “special education” or through a loose interpretation of when a service is “related”—has been enormous.

This Court has previously recognized the potential dimensions of this problem. In *Irving Indep. School Dist. v. Tatro*, *supra*, the Court found a catheterization procedure to be a “related service” because it was necessary to enable the child to remain on the school premises, which in turn allowed her to benefit from education. In so holding, however, the Court was careful to make clear that not all services needed by a handicapped person would properly be covered as “related services” under the Act. On the contrary, “[t]o keep in perspective the obligation to provide services that relate to both the health and educational needs for handicapped students,” the Court emphasized that “only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless [of] how easily a school nurse or layperson could furnish them. For example, if a

particular medication or treatment may appropriately be administered to a handicapped child *other than during the school day*, a school is not required to provide nursing services to administer it." 468 U.S. at 894 (emphasis supplied).

The decision in the instant case completely undoes the approach marked out in *Tatro*. By redefining "related services" to be a part of special education, the First Circuit has mandated that they be provided by local school districts to handicapped children in all circumstances, and not only when necessary to allow a child to remain in school. This holding is also plainly at odds with the terms of the statute since the services in question—"occupational therapy" and "physical therapy"—are expressly identified as "related services." 20 U.S.C. 1401(a)(17). Thus, even though the boundaries of what constitutes "special education" may not be precisely delineated in the EAHCA, it is clear that the services at issue in this case cannot properly be included within those boundaries.

This aspect of the court of appeals' decision is likely to have very important consequences. If followed, it will greatly increase burdens on local school districts by requiring that they provide and pay for virtually all services needed by millions of handicapped children. In view of the dimensions of those needs, the impact is likely to be very substantial indeed. Such a clearly incorrect reading of the statute, which threatens to have major financial consequences, should not be allowed to stand. This is especially true because, to all appearances, the court below was focused on a different issue and therefore was probably unaware of the potential effects of its redefinition of educational services under the EAHCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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89-515
No. _____

Supreme Court, U.S.

FILED

SEP 27 1989

JOSEPH F. SPANIOLO, JR.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1847

TIMOTHY W., ETC.,
Plaintiff, Appellant,
v.

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Defendant, Appellee.

Appeal from the United States District Court
for the District of New Hampshire
[Hon. Martin F. Loughlin, *U.S. District Judge*]

Before Bownes, Aldrich, and Breyer,
Circuit Judges.

May 24, 1989

BOWNES, *Circuit Judge*. Plaintiff-appellant Timothy W. appeals an order of the district court which held that under the Education for All Handicapped Children Act, a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. We reverse.

I. BACKGROUND

Timothy W. was born two months prematurely on December 8, 1975 with severe respiratory problems, and shortly thereafter experienced an intracranial hemorrhage, subdural effusions, seizures, hydrocephalus, and

meningitis. As a result, Timothy is multiply handicapped and profoundly mentally retarded. He suffers from complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness. His mother attempted to obtain appropriate services for him, and while he did receive some services from the Rochester Child Development Center, he did not receive any educational program from the Rochester School District when he became of school age.

On February 19, 1980, the Rochester School District convened a meeting to decide if Timothy was considered educationally handicapped under the state and federal statutes, thereby entitling him to special education and related services. The school district heard testimony from Dr. Robert Mackey, Timothy's pediatrician and Medical Consultant for SSI (Supplemental Security Income Program), to the effect that Timothy was severely handicapped. Dr. Mackey recommended the establishment of an educational program for Timothy, which emphasized physical therapy and stimulation. Reports by Susan Curtis, M.S., and Mary Bamford, O.T.R., an occupational therapist, also recommended an educational program consisting of occupational therapy and increasing Timothy's responses to his environment. Testimony of Timothy's mother indicated that he responded to sounds. Carrie Foss, director of the Rochester Child Development Center, testified that Timothy localized sound, responded to his name, and responded to his mother. On the other hand, Dr. Alan Rozycki, a pediatrician at the Hitchcock Medical Center, reported that Timothy had no educational potential, and Dr. Patricia Andrews, a developmental pediatrician, stated that hydrocephalus had destroyed part of Timothy's brain. The school district adjourned without making a finding. In a meeting on March 7, 1980, the school district decided that Timothy was not educationally handicapped—that since his handicap was so severe he was not "capable of benefitting" from an education, and therefore was not entitled to one. During 1981 and

1982, the school district did not provide Timothy with any educational program.

In May, 1982, the New Hampshire Department of Education reviewed the Rochester School District's special education programs and made a finding of non-compliance stating that the school district was not allowed to use "capable of benefitting" as a criterion for eligibility. No action was taken in response to this finding until one year later, on June 20, 1983, when the school district met to discuss Timothy's case. Ruth Keans, from the Rochester Child Development Center, reported that Timothy responded to bells and his mother's voice, and recommended frequent handling and positioning. Brenda Clough, Program Director at the Rochester Child Development Center, also concluded that Timothy could respond to positioning and handling, and recommended a physical therapy program that included a tactile component. The school district, however, continued its refusal to provide Timothy with any educational program or services.

In response to a letter from Timothy's attorney, on January 17, 1984, the school district's placement team met. In addition to the previously listed reports, it had available a report from Lynn Miller, an expert in physical therapy for handicapped children, who had seen Timothy seven times, and concluded that he responded to motion and handling and enjoyed loud music. She determined that his educational needs included postural drainage, motion exercises, sensory stimulation, positioning, and stimulation of head control. The placement team recommended that Timothy be placed at the Child Development Center so that he could be provided with a special education program. The Rochester School Board,¹ however, refused to authorize the placement team's recommendation to provide educational services for Timothy,

¹ The School Board has the final decision-making authority for the school district.

contending that it still needed more information. The school district's request to have Timothy be given a neurological evaluation, including a CAT Scan, was refused by his mother.

On April 24, 1984, Timothy filed a complaint with the New Hampshire Department of Education requesting that he be placed in an educational program immediately. On October 9, 1984, the Department of Education issued an order requiring the school district to place him, within five days, in an educational program, until the appeals process on the issue of whether Timothy was educationally handicapped was completed. The school district, however, refused to make any such educational placement. On October 31, 1984, the school district filed an appeal of the order. There was also a meeting on November 8, 1984, in which the Rochester School Board reviewed Timothy's case and concluded he was not eligible for special education.

On November 17, 1984, Timothy filed a complaint in the United States District Court, pursuant to 42 U.S.C. § 1983, alleging that his rights under the Education for All Handicapped Children Act (20 U.S.C. § 1400 *et seq.*), the corresponding New Hampshire state law (RSA 186-C), § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and the equal protection and due process clauses of the United States and New Hampshire Constitutions, had been violated by the Rochester School District. The complaint sought preliminary and permanent injunctions directing the school district to provide him with special education, and \$175,000 in damages.

A hearing was held in the district court on December 21, 1984. Timothy's mother testified that he hears somewhat, sees bright light, smiles when happy, cries when sad, listens to television and music, and responds to touching and talking. Lynn Miller, who had been providing physical therapy to Timothy for over a year, testified that Timothy responded to movement, touch, music, and other sounds, and that his educational needs included

postural drainage, range of motion, sensory stimulation of all kinds, correct positioning, proper sitting equipment, and work with his head control. Mariane Riggio, an expert in services for severely handicapped deaf-blind children, testified that Timothy was severely retarded but that he had definite light perception and could differentiate between sounds. She concluded that Timothy would be harmed if he was not given the benefit of an educational program. Dr. William Schofield, an expert in special education for the severely handicapped, testified that he had evaluated Timothy and that his educational needs included occupational therapy, development of some kind of communication program, a toileting program, a feeding program, and tactile stimulation discrimination which might be the basis for a communication process. Dr. Patricia Andrews, a developmental pediatrician, was the only person who testified that Timothy did not have educational needs and could not benefit from education. Her only contact with Timothy had been during an evaluation when he was two months old. While she testified that Timothy was profoundly mentally retarded and that an X-ray study of his brain showed he had virtually no cortex present, she also stated that such a study alone could not predict how much functioning was going to develop. On January 3, 1985, the district court denied Timothy's motion for a preliminary injunction, and on January 8, stated it would abstain on the damage claim pending exhaustion of the state administrative procedures.

On December 7, 1984, the State Commissioner of Education had ordered a diagnostic prescriptive program for Timothy: that he receive three hours of tutoring per week and that an evaluation be made concerning his capacity to benefit. Timothy's attorney, not the school district, made the necessary arrangements, and Timothy entered the school district's ABLE² program in May,

² The record does not state whether ABLE is an acronym or the full name.

1985. The ABLE reports on Timothy indicate that he is handicapped, has educational needs, and would benefit from an educational program. An Evaluation Summary prepared on August 2, 1985 by Susan Keefe, a teacher who worked with Timothy in the ABLE program, concluded that he demonstrated abilities in visual development (could see shadows), auditory development (recognizes familiar voices, responds with smiles, extension of limbs, and turns head), tactile development (responds to stimulation), cognition communication, language (uses different facial expressions to show emotions, and social development (resists changes in his immediate environment). Keefe noted that Timothy had made particular progress in learning to move his head towards a person speaking his name and in learning to activate a switch. Subsequently, Timothy was allowed to attend the ABLE program intermittently: from October 29, 1985 to November 18, 1985, from December 2 to December 22, 1985, and from May 8, 1986 through June 3, 1986. Keefe reiterated her previous recommendation for a long-term uninterrupted program.

In September, 1986, Timothy again requested a special education program. In October, 1986, the school district continued to refuse to provide him with such a program, claiming it still needed more information. Various evaluations were done at the behest of the school district. On December 30, 1985, Dr. Cecilia Pinto-Lord, a neurologist, had given Timothy a negative prognosis for learning, but did indicate he had some awareness of his environment; on October 10, 1986, Dr. Pinto-Lord stated that acquisition of new skills by Timothy was very unlikely. On May 19, 1986, Mary-Margaret Windsor, an occupational therapist, conducted an occupational therapy evaluation and concluded that Timothy might respond to an oral-motor program, and that without consistent management strategies there was great potential for increased deformities and contractures (a condition of fixed high

resistance to passive stretch of a muscle). A psychological evaluation conducted by Dr. John Morse, a psychologist, on June 23, 1986, concluded that Timothy demonstrates behavioral awareness of strangers, recognizes familiar voices, positively responds to handling by a familiar person, recognizes familiar sounds, and demonstrates a selective response to sound. He recommended physical and occupational therapy, and cognitive programming efforts to continue in the areas of consistently responding to sound, anticipating feeding, and operating an electronic device to operate a sound source. And on January 9, 1987, Ruth Keans, a physical therapist at the Child Development Center, performed a physical therapy evaluation and concluded that she did not see any voluntary movements, but that Timothy did respond to his mother's voice. She recommended physical therapy.

The school district, on January 12, 1987, arranged another diagnostic placement at the Rochester Child Development Center. A report of March 13, 1987 by Dr. Schofield, an expert in special education for the severely handicapped, indicated that Timothy was aware of his environment, could locate to different sounds made by a busy box, and that he attempted to reach for the box himself. He recommended the establishment of specific teaching/learning strategies for Timothy. On June 23, 1987, Rose Bradder, Program Coordinator at the Center, also recommended that Timothy continue to receive educational services. Experts in the field of special education retained on behalf of Timothy all concluded that he responded to certain stimuli and was capable of learning. For example, Dr. Robert Kugel, a physician specializing in developmental disabilities, found that Timothy responded to light, familiar voices, touch, taste, smell, pain, and temperature, that he made purposeful movements with his head, and that he showed evidence of retaining some higher cortical functioning which indicated that he could learn in certain areas.

On May 20, 1987, the district court found that Timothy had not exhausted his state administrative remedies before the New Hampshire Department of Education, and precluded pretrial discovery until this had been done. On September 15, 1987, the hearing officer in the administrative hearings ruled that Timothy's capacity to benefit was not a legally permissible standard for determining his eligibility to receive a public education, and that the Rochester School District must provide him with an education. The Rochester School District, on November 12, 1987, appealed this decision to the United States District Court by filing a counterclaim, and on March 29, 1988, moved for summary judgment. Timothy filed a cross motion for summary judgment.

Hearings were held on June 16 and 27, 1988, pursuant to Fed. R. Civ. P. 65(a)(2), relating "solely to the issue of whether or not Timothy W. qualifie[d] as an educationally handicapped individual." In addition to the large record containing the reports described above, additional testimony was obtained from various experts. Timothy's experts, Kathy Schwaninger, consultant to United Cerebral Palsy, and Rose Bradder, Program Coordinator at the Child Development Center, testified that Timothy would benefit from a special educational program including physical and occupational therapy, with emphasis on functional skills. The school district presented Carrie Foss, Executive Director of the Child Development Center, who disagreed with her own staff and testified that Timothy had shown no progress. The district court relied heavily on another school district witness, Dr. Patricia Andrews, a developmental pediatrician, who testified that Timothy probably does not have the capacity to learn educational skills and activities. She also testified: that she was not an expert in the education of handicapped children; that her only contact with Timothy was when he was two months old; that he might have the capacity to respond to his environment and change in

some ways; that the X-ray bubble test performed on Timothy in 1976, which she was using as a basis for concluding that Timothy had virtually no brain cortex and therefore no capacity to learn, was not the most sophisticated and accurate technology currently available; and that even a CAT scan could not predict Timothy's ability to learn.

On July 15, 1988, the district court rendered its opinion entitled "Order on Motion for Judgment on the Pleadings or in the Alternative, Summary Judgment." The record shows that the court had before it all the materials and reports submitted in the course of the administrative hearings, and the testimony from the two-day hearing. The court made rulings of law and findings of fact. It first ruled that "under EAHCA [the Education for All Handicapped Children Act], an initial determination as to the child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act." After noting that the New Hampshire statute (RSA 186-C) was intended to implement the EAHCA, the court held: "Under New Hampshire law, an initial decision must be made concerning the ability of a handicapped child to benefit from special education before an entitlement to the education can exist." The court then reviewed the materials, reports and testimony and found that "Timothy W. is not capable of benefiting from special education As a result, the defendant [school district] is not obligated to provide special education under either EAHCA [the federal statute] or RSA 186-C [the New Hampshire statute]." Timothy W. has appealed this order. Neither party objected to the procedure followed by the court.

The primary issue is whether the district court erred in its rulings of law. Since we find that it did, we do not review its findings of fact.

II. THE LANGUAGE OF THE ACT

A. *The Plain Meaning of the Act Mandates a Public Education for All Handicapped Children*

The Education for All Handicapped Children Act, [hereinafter the Act], 20 U.S.C. §§ 1400 et seq., was enacted in 1975 to ensure that handicapped children receive an education which is appropriate to their unique needs. In assessing the plain meaning of the Act, we first look to its title: The Education for *All* Handicapped Children Act. (Emphasis added). The Congressional Findings section of the Act states that there were eight million handicapped children, that more than half of them did not receive appropriate educational services, and that one million were excluded entirely from the public school system. 20 U.S.C. § 1400(b)(1), (3), and (4). Given these grim statistics, Congress concluded that "State and local educational agencies have a responsibility to provide education for *all* handicapped children" 20 U.S.C. § 1400(b)(8) (emphasis added). In directly addressing the educability of handicapped children, Congress found that "developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies *can and will* provide effective special education and related services to meet the needs of handicapped children." 20 U.S.C. § 1400(b)(7) (emphasis added). The Act's stated purpose was "to assure that *all* handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, . . . [and] to assist states and localities to provide for the education of *all* handicapped children" 20 U.S.C. § 1400(c) (emphasis added).

The Act's mandatory provisions require that for a state to qualify for financial assistance, it must have

"in effect a policy that assures *all* handicapped children the right to a free appropriate education." 20 U.S.C. § 1412(1) (emphasis added). The state must "set forth in detail the policies and procedures which the State will undertake . . . to assure that—there is established a goal of providing full educational opportunity to *all* handicapped children . . . , [and that] a free appropriate public education will be available for *all* handicapped children between the ages of three and eighteen . . . not later than September 1, 1978, and for *all* handicapped children between the ages of three and twenty-one . . . not later than September 1, 1980" 20 U.S.C. § 1412(2)(A) and (B) (emphasis added). The state must also assure that "*all* children residing in the State who are handicapped, *regardless of the severity of their handicap*, and who are in need of special education and related services are identified, located, and evaluated" 20 U.S.C. § 1412(2)(C) (emphasis added). *See also* 20 U.S.C. § 1414(a)(1)(A). The Act further requires a state to:

establish[] priorities for providing a free appropriate public education to all handicapped children, . . . first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education

20 U.S.C. § 1412(3) (emphasis added). *See also* 20 U.S.C. § 1414(a)(1)(C). Thus, not only are severely handicapped children not excluded from the Act, but the most severely handicapped are actually given *priority* under the Act.

In addition, the duties of the Secretary are listed as including the evaluation of "the effectiveness of State efforts to assure the free appropriate public education of *all* handicapped children" and transmitting "a report on

the progress being made toward the provision of free appropriate public education to *all* handicapped children." 20 U.S.C. § 1418(a) and (c) (emphasis added). In its discussion of reallocation of funds, the Act states that "whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to *all* handicapped children . . . [it] may reallocate funds" 20 U.S.C. § 1414(e) (emphasis added).

The language of the Act could not be more unequivocal. The statute is permeated with the words "*all* handicapped children" whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, as indicated *supra*, the Act gives priority to the most severely handicapped. Nor is there any language whatsoever which requires as a prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will "benefit" from the educational program. Rather, the Act speaks of the *state's* responsibility to design a special education and related services program that will meet the unique "needs" of all handicapped children. The language of the Act in its entirety makes clear that a "zero-reject" policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all. In summary, the Act mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might attain.

B. *Timothy W.: A Handicapped Child Entitled to An Appropriate Education*

Given that the Act's language mandates that all handicapped children are entitled to a free appropriate edu-

cation, we must next inquire if Timothy W. is a handicapped child, and if he is, what constitutes an appropriate education to meet his unique needs.

(1) *handicapped children:*

The implementing regulations define handicapped children as "being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services." 34 C.F.R. § 300.5. *See also* 20 U.S.C. § 1401(1). "Mentally retarded" is described as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance." 34 C.F.R. § 300.5(b)(4).³ "Multi-handicapped" is defined as "concomitant impairments (such as mentally retarded—blind, mentally retarded—orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments." 34 C.F.R. § 300.5(b)(5). "Orthopedically impaired" means "a severe orthopedic impairment which adversely affects a child's educational performance" and "includes impairments caused by congenital anomaly, . . . disease, . . . [and] from other causes (e.g. cerebral palsy, . . .)." 34 C.F.R. § 300.5(b)(6). "Specific learning disability" in-

³ It is noteworthy that the regulations make no distinctions among the four recognized degrees of mental retardation: mild, moderate, severe, and profound. *See American Psychiatric Association, Diagnostic and Statistic Manual of Mental Disorders* 39-40 (3d ed. rev. 1987) (children with profound mental retardation, having IQ's below 20 and displaying minimal capacity for sensorimotor functioning, may improve their motor development, self-care, and communication skills if appropriate training is provided).

cludes such conditions as "perceptual handicaps, brain injury, minimal brain disfunction." 34 C.F.R. § 300.5(b) (9).

There is no question that Timothy W. fits within the Act's definition of a handicapped child: he is multiply handicapped and profoundly mentally retarded. He has been described as suffering from severe spasticity, cerebral palsy, brain damage, joint contractures, cortical blindness, is not ambulatory, and is quadriplegic.

(2) *appropriate public education:*

The Act and the implementing regulations define a "free appropriate public education" to mean "special education and related services which are provided at public expense . . . [and] are provided in conformity with an individualized education program." 34 C.F.R. § 300.4; 20 U.S.C. § 1401(18).

(a) "*Special education*" means "specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in *physical education*, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.14(a)(1); 20 U.S.C. § 1401(a)(16) (emphasis added). It is of significance that the Act explicitly provides for education of children who are so severely handicapped as to require hospitalization or institutionalization. Timothy W.'s handicaps do not require such extreme measures, as he can be educated at home. The Act goes on to define "*physical education*" as the "development of: physical and motor fitness; fundamental motor skills and patterns . . . [and] includes special physical education, adapted physical education, movement education, and motor development." 34 C.F.R. § 300.14(b)(2). Thus, the Act's concept of special education is broad, encompassing not only traditional cognitive skills, but basic functional skills as well.

(b) "*Related services*" means "transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation" 34 C.F.R. § 300.13(a)(6); 20 U.S.C. § 1401(a)(17). "Physical therapy" means "services provided by a qualified physical therapist." 34 C.F.R. § 300.13(7). "Occupational therapy" includes "improving, developing or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning" 34 C.F.R. § 300.13(5). Furthermore, the "comment" to these implementing regulations notes that "the list of related services is not exhaustive and may include other developmental, corrective, or supportive services . . . if they are required to assist a handicapped child to benefit from special education."

(c) An "*individualized education program*" is a written plan developed by the local educational agency in conjunction with the parents and teacher, which provides "specially designed instruction to meet the unique needs" of the handicapped child. 20 U.S.C. § 1401(19). Such a program is to be periodically reviewed, and if appropriate, revised. 20 U.S.C. § 1412(4) and 1414(a)(5).

The record shows that Timothy W. is a severely handicapped and profoundly retarded child in need of special education and related services. Much of the expert testimony was to the effect that he is aware of his surrounding environment, makes or attempts to make purposeful movements, responds to tactile stimulation, responds to his mother's voice and touch, recognizes familiar voices, responds to noises, and parts his lips when spoon fed. The record contains testimony that Timothy W.'s needs include sensory stimulation, physical therapy, improved head control, socialization, consistency in responding to sound sources, and partial participation in eating. The

educational consultants who drafted Timothy's individualized education program recommended that Timothy's special education program should include goals and objectives in the areas of motor control, communication, socialization, daily living skills, and recreation. The special education and related services that have been recommended to meet Timothy W.'s needs fit well within the statutory and regulatory definitions of the Act.

We conclude that the Act's language dictates the holding that Timothy W. is a handicapped child who is in need of special education and related services because of his handicaps. He must, therefore, according to the Act, be provided with such an educational program. There is nothing in the Act's language which even remotely supports the district court's conclusion that "under [the Act], an initial determination as to a child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act." The language of the Act is directly to the contrary: a school district has a duty to provide an educational program for every handicapped child in the district, regardless of the severity of the handicap.

III. LEGISLATIVE HISTORY

An examination of the legislative history reveals that Congress intended the Act to provide a public education for all handicapped children, without exception; that the most severely handicapped were in fact to be given priority attention; and that an educational benefit was neither guaranteed nor required as a prerequisite for a child to receive such education. These factors were central, and were repeated over and over again, in the more than three years of congressional hearings and debates, which culminated in passage of the 1975 Act.

A. *Education For All Handicapped Children*

The Act was a response to tomes of testimony and evidence that handicapped children were being system-

atically excluded from education outright, or were receiving grossly inadequate education. The Office of Education provided Congress with a report documenting that there were eight million handicapped children, and that more than four million of them were not receiving an appropriate education, including almost two million who were receiving *no* education at all. See S. Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News, 1425, 1432 [hereinafter Senate Report]; H.R. Rep. No. 332, 94th Cong., 1st Sess. 11 (1975) [hereinafter House Report]; codified at 20 U.S.C. § 1400(b)(1)-(4). There were innumerable individuals, including parents, teachers, and other professionals, who gave testimony at the congressional hearings confirming the exclusion of handicapped children from educational services. See, e.g., *Education for all Handicapped Children, 1973-74: Hearings on S6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973-74) [hereinafter Senate Hearings].

The record is replete with statements by legislators that the Act was in response to this deplorable state of affairs:

Exclusion from school, institutionalization, the lack of appropriate services to provide attention to the individual child's need—indeed, the denial of equal rights by a society which proclaims liberty and justice for all of its people—are echoes which the subcommittee has found throughout all of its hearings

. . . .

Senate Hearings at 1155-56 (emphasis added) (remarks of Sen. Williams, Committee Chairman, principal author of bill).

For many years handicapped children have been placed in institutions, or segregated in schools and classes, or *left to sit at home*, where they have not

received the educational opportunity which is their right under the law.

Senate Hearings at 1153 (emphasis added) (remarks of Sen. Mondale, Subcommittee member).

What we are after in this legislation is to rewrite one of the saddest chapters in American education, a chapter in which we were silent while young children were shut away and condemned to a life without hope. This legislation offers them hope, hope that *whatever their handicap*, they will be given the chance to develop their abilities as individuals and to reach out with their peers for their own personal goals and dreams.

Senate Hearings at 341 (emphasis added) (remarks of Sen. Kennedy, co-sponsor of bill).

Moreover, the legislative history is unambiguous that the primary purpose of the Act was to remedy the then current state of affairs, and provide a public education for *all* handicapped children. As the Committee Chairman, Senator Williams stated:

We must recognize our responsibility to provide education for *all* children which meets their unique needs. The denial of the right to education and to equal opportunity within this Nation for handicapped children—whether it be outright exclusion from school, the failure to provide an education which *meets the needs of a single handicapped child*, or the refusal to recognize the handicapped child's right to grow—is a travesty of justice and a denial of equal protection of the law.

120 Cong. Rec. S15271 (1974).

Most states have legal provisions which authorize school authorities to exclude certain [handicapped] children from public school. . . . [This] act establishes a target date of 1976 for bringing *all* of the

Nation's handicapped children into adequate programs.

Senate Hearings at 342 (emphasis added) (remarks of Sen. Brooke, co-sponsor of bill).

Recent court decisions . . . have made it clearer than ever that we have not only a moral but also a legal obligation to provide the opportunity for *every handicapped citizen* to insure his or her highest educational potential. An important provision of the bill before us today would require that every State have in effect a policy stating the *right of all handicapped children* to a "free appropriate public education". . . . The bill would also require that each handicapped child be treated as an individual with unique strengths and weaknesses, and not as a member of a category of children all presumed to have the same needs.

Senate Hearings at 1153-54 (emphasis added) (remarks of Sen. Mondale, Subcommittee member).⁴ The Senate Committee recognized "the need for a final date in legislation by which time *all* handicapped children are to be provided a free appropriate public education," and that "the failure to provide a right to education to handicapped children cannot be allowed to continue." Senate Report at 7, 9 (1975). Senator Williams, the principal author of the statute, described the Conference Report:

⁴ See also, e.g., statements during the floor debate on the House Bill: Rep. Cornell (co-sponsor of bill): "the purpose of this bill is . . . to assure that *all* handicapped children have available to them special educational and related services designed to meet their unique needs . . . [and] to assist States and localities to provide for the education of *all handicapped children*," 121 Cong. Rec. H25538 (1975); Rep. Quie (ranking minority member of subcommittee): "we provide in this legislation that if you [the States] are going to receive funds by 1978 you have to provide education for *all* of those who are handicapped within the State," *id.* at H25535. (Emphasis added).

This measure fulfills the promise of the Constitution that there shall be equality of education for all people and that handicapped children no longer will be left out. . . . The conference report establishes as a matter of law . . . provisions which will assure the right to education for *all* handicapped children in the United States. It establishes a process by which the goal of educating *all* handicapped can and will be established. . . . [I]t require[s] an individualized education program tailored to the unique needs of *each* handicapped child. . . . [It] protects against handicapped children being excluded from school by requiring that *all* such children aged 3 to 18 be served. . . . [It] establishes the State educational agency as solely responsible for the provision of free appropriate education to *all* handicapped children in the State. . . . [T]he timetable and priorities assure that the goals of this act will be met *for each and every handicapped child* within a State.

121 Cong. Rec. S37413-14 (1975) (emphasis added).⁵

⁵ Other floor statements from co-sponsors and conference committee members reiterated the same point. For example, Sen. Schweiker commented: "The purpose of the pending measure is to ensure that *all* handicapped children have available to them a free appropriate public education," 121 Cong. Rec. S37417 (1975); Sen. Biden: "there must be an assurance of an effective policy which guarantees the right of *all* handicapped children to a free, appropriate public education," *id.* at S37418; Sen. Cranston: "to assure equal educational opportunities for *all* children of this country, *regardless of their physical or mental abilities*," *id.* at S37418; Sen. Beall: "establishing education as a right for *all* children *regardless of any handicap* they may experience," *id.* at S37419; Rep. Brademas: "this measure is necessary . . . if we are to insure that *all* children in the United States receive the free education to which they are entitled," 121 Cong. Rec. H37024 (1975); Rep. Perkins: "the congressional goal of insuring a full educational opportunity for *all* handicapped children," *id.* at H37025; Rep. Gude: "*all* children *regardless of any exceptional conditions* have a constitutional right to publicly supported education," *id.* at H37027; Rep. Ford: "school systems . . . must agree to provide

B. *Priority For The Most Severely Handicapped*

Not only did Congress intend that all handicapped children be educated, it expressly indicated its intent that the most severely handicapped be given priority. This resolve was reiterated over and over again in the floor debates and congressional reports, as well as in the final legislation.

The principal author, Senator Williams, stated that the bill "assures that handicapped children in the greatest need will be given *priority* by requiring that services be provided first to those children not receiving an education; and second, *to those children with the most severe handicaps* receiving an inadequate education." 121 Cong. Rec. S37413 (1975) (emphasis added).⁹

The Senate Committee's report stated:

[T]he Committee has provided that States shall provide second priority . . . to handicapped children

a free, public education to *all* handicapped children," *id.* at H37028; Rep. Conte: "this legislation . . . will prove to be the long awaited step towards a national program to 'insure' quality education to *all* handicapped Americans who number in the millions . . . and puts education for the handicapped in its proper perspective—an 'essential' supplementary program *due each and every* handicapped American," *id.* at H37029. (Emphasis added).

⁹ See also, e.g., remarks of Sen. Javits (conference committee member): "[the bill] sets forth a priority for the use of Federal funds for the education of handicapped children . . . the first priority is to children 'unserved,' . . . the second priority to children inadequately served with a priority on the most severely handicapped children," 121 Cong. Rec. S37417 (1975); Sen. Biden (co-sponsor of bill): "[the bill] gives first priority to 'unserved' handicapped children and then to children who have been inadequately served even though they are severely handicapped," *id.* at 37418; Rep. Brademas: "the moneys received . . . must be spent first on providing a public education for handicapped children not now being served, and second, on more adequately serving those children who are severely handicapped," 121 Cong. Rec. H37027 (1975).

with the most severe handicaps It is the intent of the Committee that States follow this priority by providing services to handicapped children who, within each disability group, (including the multi-handicapped as a disability group) have the most severe handicaps. *Priority must be given to multi-handicapped children who are the most severely disabled*

Senate Report at 22 (1975). *See also id.* at 18, 46. The House report also included such priorities: "In conformance with the overall goal of ending exclusion . . . [the bill gives] first priority to children 'unserved' [and] second priority to severely handicapped children." House Report at 12 (1975).

This priority reflected congressional acceptance of the thesis that early educational intervention was very important for severely handicapped children. *See, e.g.*, 121 Cong. Rec. S19493 (1975) (remarks of Sen. Williams) ("The Bureau of Education for the handicapped has documented that, especially with respect to children who are most severely handicapped—that is, persons who are deaf, blind, deaf-blind, severely or profoundly mentally retarded, severely physically handicapped—the earlier educational services are provided the greater the results.").

If the order of the district court denying Timothy W. the benefits of the Act were to be implemented, he would be classified by the Act as in even greater need for receiving educational services than a severely multi-handicapped child receiving inadequate education. He would be in the *highest priority*—such as a child who was not receiving any education at all.

C. *Guarantees of Educational Benefit Are Not a Requirement For Child Eligibility*

In mandating a public education for all handicapped children, Congress explicitly faced the issue of the possibility of the non-educability of the most severely handi-

capped. The Senate Report stated, "The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome.*" Senate Report at 11 (1975) (emphasis added). The report continued: "The Committee has deleted the language of the bill as introduced which required objective criteria and evaluation procedures by which to assure that the short term instructional goals were met." *Id.* at 12. See also *Hendrick Hudson Bd. of Education v. Rowley*, 458 U.S. 176, 192 (1982) (quoting the Senate Report as support for its conclusion that the Act ensures handicapped children access to a public education, but does not guarantee any particular level of achievement from that education).

Thus, the district court's major holding, that proof of an educational benefit is a prerequisite before a handicapped child is entitled to a public education, is specifically belied, not only by the statutory language, but by the legislative history as well. We have not found in the Act's voluminous legislative history, nor has the school district directed our attention to, a single affirmative averment to support a benefit/eligibility requirement. But there is explicit evidence of a contrary congressional intent, that *no* guarantee of any particular educational outcome is required for a child to be eligible for public education.

We sum up. In the more than three years of legislative history leading to passage of the 1975 Act, covering House and Senate floor debates, hearings, and Congressional reports, the Congressional intention is unequivocal: Public education is to be provided to all handicapped children, unconditionally and without exception. It encompasses a universal right, and is not predicated upon any type of guarantees that the child will benefit from the special education and services before he or she is considered eligible to receive such education. Congress

explicitly recognized the particular plight and special needs of the severely handicapped, and rather than excluding them from the Act's coverage, gave them priority status. The district court's holding is directly contradicted by the Act's legislative history, as well as the statutory language.

D. *Subsequent Amendments to the Act*

In the 14 years since passage of the Act, it has been amended four times.⁷ Congress thus has had ample opportunity to clarify any language originally used, or to make any modifications that it chose. Congress has not only repeatedly reaffirmed the original intent of the Act, to educate all handicapped children regardless of the severity of their handicap, and to give priority attention to the most severely handicapped, it has in fact *expanded* the provisions covering the most severely handicapped children. Most significantly, Congress has never intimated that a benefit/eligibility requirement was to be instituted.

1977:

In 1977, an amendment was proposed to extend the discretionary programs of the 1975 Act, dealing with research for educating the handicapped. Congress reiterated that the goal of the bill was "to assist states to provide each handicapped child with his rightful opportunity to an education." *Report of Mr. Perkins to Accompany H.R. 6692*, 95th Cong., 1st Sess. 5 (1977). The report stressed the need for continual research to improve and develop the methodologies for teaching handicapped children:

The purpose of this provision is to improve the educational opportunities for handicapped children

⁷ Pub. L. 95-561, 92 Stat. 2364 (1978); Pub. L. 98-199, 97 Stat. 1357 (1983); Pub. L. 99-372, 100 Stat. 796 (1986); and Pub. L. 99-457, 100 Stat. 1145 (1986).

through support of applied research and related activities. The activities conducted under the research program provide information on resources essential to the development of full *educational opportunities for every handicapped child*.

Id. at 10 (emphasis added). The particular problems of educating the severely handicapped were acknowledged and addressed: "The objectives of this program include the demonstration of effective educational and training programs, the long term benefits of providing services to severely handicapped children, and building the capacity of state and local governments to provide quality specialized services through replication and adaptation of demonstrated practices." *Education of Handicapped Amendments of 1977, Report to Accompanying S. 725, S. Rep. No. 124, 95th Cong., 1st Sess. 4 (1977)*. Congress clearly understood that educational techniques and approaches for the severely handicapped were in a continual state of growth and readjustment, and that capitalizing on these refinements was integral for accomplishing the Act's mandate:

The activities conducted under the research program provide the information and resources essential to the development of full educational opportunities for every handicapped child. . . . *The research activities contribute significantly to the total mission of educating all handicapped children.*

Id. at 9 (emphasis added).

Thus, we see that in this amendment, Congress reiterated the thesis present in the original Act, that it is the state's responsibility to experiment, refine, and improve upon the educational services it provides to handicapped children, and not, as the school district would have it, to exclude handicapped children if there is no proof that they can benefit from the existing program that a state might offer at a particular time. Congress clearly saw

education for the handicapped as a dynamic process, in which new methodologies would be continually perfected, tried, and either adopted or discarded, so that the state's educational response to each handicapped child's particular needs could be better met.

1983:

In the hearings for the 1983 amendments, Congress likewise reaffirmed the original intent of the 1975 Act:

With the passage of [the Act], Congress granted to all handicapped children the "right" to a free appropriate public education. Prior to the development of this legislation . . . some [handicapped children] were receiving no educational services at all. [The Act] is the vehicle through which the federal government maintains a partnership with the states and localities to end the educational neglect of handicapped children.

Oversight Hearings on Proposed Changes in Regulations for the Education for All Handicapped Children Act: Hearings Before the Subcomm. on Select Education of the Comm. on Education and Labor, House of Representatives, 97th Cong., 2d Sess. 8 (1982).

The bill amended the term "special education" to clarify that services provided should be designed "to meet the unique 'educational' needs of the handicapped child," and stated that "it is the intent of the Committee that the term 'unique educational needs' be broadly construed to include the handicapped child's academic, social, health, emotional, communicative, physical, and vocational needs." H.R. Rep. No. 410, 98th Cong., 1st Sess. 19 (1983), reprinted in 1983 U.S. Code & Admin. News 2088, 2106.

The 1983 amendments, which extended and strengthened programs authorized under the 1975 Act, directly addressed the education of severely handicapped children. The bill reaffirmed section 624 (dealing with research,

innovation, training, and dissemination activities in connection with centers and services for the handicapped) as "a key component" of the Act, and stated: "[I]n recognition of the role of section 624 as *the principal vehicle since 1978 for funding projects which serve handicapped children with the most severe disabilities (such as the multiple handicapped)*, the Committee bill reinforces this focus by establishing a specific authorization of appropriation for [this subsection]." *Id.* at 28 (emphasis added). The bill also specifically expanded services for deaf blind children. *Id.* at 25-26. As the Senate Committee's report on the amendments stated:

This program is designed to assist state and local educational agencies in *improving education and training to severely handicapped children* and youth, many of whom require complex, varied and often times expensive educational services. In general, this group of children includes those who are classified as seriously emotionally disturbed, autistic, *profoundly and severely mentally retarded*, and those *with multiple handicapping conditions*. Since 1978, projects have been targeted to specific areas of national need concerning the education of the severely handicapped individuals.

Education of the Handicapped Act Amendments of 1983: Report of Mr. Hatch to Accompany S. 1341, Comm. on Labor and Human Resources, S. Rep. No. 191, 98th Cong., 1st Sess. 7 (1983).

So once again, Congress reaffirmed its commitment to provide a public education for children like Timothy W.

1986:

In the most recent amendments, Congress again reconfirmed its commitment to the original Act, and also provided for an extension of the age groups covered, mandating that all preschool handicapped children aged three

to five be entitled to public education, and establishing a new federal education program for handicapped babies from birth through age two. The Senate Committee report stated that "the Committee has provided the impetus for universal access to services for *all handicapped children beginning at birth.*" S. Rep. No. 315, 99th Cong., 2d Sess. 3, 5 (1986). See also H. Rep. No. 860, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 2401. Sen Stafford, co-sponsor of the amendments, commented:

We are doing it because we have always known that all Americans have the right to equal educational opportunities. Indeed, over the years court decisions have directed our attention to the fact that all handicapped individuals . . . [h]ave the right to public education, regardless of the degree of disability. . . . *[E]ven the most severely handicapped child can be made less dependent through education.*

132 Cong. Rec. S7038 (1986) (emphasis added).

These amendments focused particularly on the needs of deaf-blind and multiply handicapped children, extending provisions for specialized, intensive professional and allied services, methods and aids that are found to be most effective. 20 U.S.C. § 1422. The Senate Report stated: "[T]he majority of the deaf-blind population is severely and multiply handicapped. . . . By retaining current law the Committee recognizes the continued need for the resources . . . serving deaf-blind children [T]hese resources should be made available to certain severely, multiply handicapped children." S. Rep. No. 315, 99th Cong., 2d Sess. 12-13 (1986). Thus, the commitment to educate the most severely handicapped was again reconfirmed. As Rep. Miller concluded in a comment directly pertinent to the actions of the school district in this case:

What we have seen over the 10 years of this program is that this law has dramatically increased the opportunities for the handicapped to participate . . .

Time and again we were told of cases where people tried to deny that access to go back to the days that gave them impetus to this legislation when children who were handicapped were educated in basements, . . . children were denied education This legislation has overcome that problem But that is not to say that all educational institutions have accepted it readily and that they still do not battle and seek the time when perhaps they can roll this back. So the extension of this program is an important signal

132 Cong. Rec. H7905 (September 22, 1986).

In summary, the Congressional reaffirmation of its intent to educate all handicapped children could not be any clearer. It was unequivocal at the time of passage of the Act in 1975, and it has been equally unequivocal during the intervening years. The school district's attempt in the instant case to "roll back" the entire thrust of this legislation completely ignores the overwhelming congressional consensus on this issue.

IV. CASE LAW

A. *Cases Relied on in the Act*

In its deliberations over the Act, Congress relied heavily on two landmark cases, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (PARC), 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which established the principle that exclusion from public education of any handicapped child is unconstitutional. See Senate Report at 6-7 (1975) ("[The Act] followed a series of landmark court cases establishing in law the right to education for all handicapped children. . . . Since those initial decisions in 1971 and 1972 and with similar decisions in 27 states, it is clear today that this 'right to education' is no longer in question."); see also House Report at 3-4 (1975).

The court in *PARC* articulated the thesis that:

[A]ll mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self care

PARC, 343 F. Supp. at 296 (emphasis added). The Consent Agreement for the case, approved by the court, concluded that "Pennsylvania may not deny *any mentally retarded child* access to a free public program of education and training." *Id.* at 307 (emphasis added). In *Mills*, the court held that denying handicapped children a public education was violative of the constitutional guarantees of equal protection and due process. *Mills*, 348 F. Supp. at 875. It ordered that the District of Columbia "shall provide to each child of school age a free and suitable publicly-supported education *regardless of the degree of the child's mental, physical, or emotional disability or impairment.*" *Id.* at 878 (emphasis added).

B. All Handicapped Children are Entitled to a Public Education

Subsequent to the enactment of the Act, the courts have continued to embrace the principle that all handicapped children are entitled to a public education, and have consistently interpreted the Act as embodying this principle. In *Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981), the court declared that "[t]he Education Act embodies a strong federal policy to provide an appropriate education for every handicapped child," *id.* at 690, that there was an "unequivocal congressional directive to provide an appropriate education for all children regardless of the severity of the handicap, 20 U.S.C. § 1412(2) (C)," *id.* at 695, and that "[t]he language and the legislative history of the Act

simply do not entertain the possibility that some children may be untrainable." *Id.* at 695 (emphasis added). In *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869, 879 (S.D. Tex. 1981), it was held that the school district must provide a residential educational placement for a severely retarded, multiply handicapped, schizophrenic child who had "extremely guarded" prospects, because "[t]he language and legislative history of [the] Act simply do not admit of the possibility that some children may be beyond the reach of our educational expertise." In *Garrity v. Gallen*, 522 F. Supp. 171, 215 (D.N.H. 1981), *aff'd*, 697 F.2d 452 (1st Cir. 1983), a class action suit brought by residents of the Laconia State School against the state, to ensure that profoundly retarded and multiply physically handicapped students receive educational services under the Act, the district court stated: "plaintiffs succeeded in proving at trial not only that certain categories of individuals such as the profoundly retarded have, as a group, been discriminated against in the past, but that certain assumptions about their inability to learn and develop are inaccurate [And] although at one time [they] were cast aside as 'untrainable,' [many] have through habilitation learned to care for themselves" The court concluded that "profoundly retarded residents must be afforded education and training services to the same extent as mildly retarded residents, even though the teaching methods might be different." *Id.* at 217. In its Order for Implementation, the court stated "*No member of the afore-said subclass shall be denied special education and related services based on the severity of his/her handicap*" (emphasis added). And in *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), rather than the court ruling that a severely and profoundly handicapped child's seemingly insurmountable handicaps should preclude him from a public education, the court ordered the school to

provide him an additional summer program *because* of the severity of his disability.

The district court's reliance on *Matthews v. Campbell*, 3 EHLR 551:264 (E.D. Va. 1979), is misfounded. In ordering the school district to provide a residential placement for a profoundly mentally retarded child, the *Matthews'* court speculated as to what it might do if the child proved uneducable even in that setting, but commented that "[n]either the language of the Act nor the legislative history appears to contemplate the possibility that certain children may simply be untrainable."⁹ *Id.* at 266. The district court's reliance on *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985), is also misplaced. In *Parks*, the court *speculated* that in the *hypothetical* case of a child in a *coma*, the state might not have to pay for the living expenses of such a child placed in an institution since such a child would be uneducable and therefore his living expenses would not be related to education. *Id.* at 1405. This dictum is irrelevant to the instant case. Timothy W. lives at home, is seeking only educational services, not institutional placement, is not in a coma, and does respond to stimuli and his environment. Moreover, the *actual* issue in the *Parks* case directly dealt with the question of uneducability for severely handicapped and retarded children (as opposed to a hypothetical child in a coma) :

With persons as severely retarded as [plaintiff], the scope for education is extremely limited, but we do not understand the state to be arguing that [plaintiff] or the other members of the class are uneducable. *Nor would such an argument be likely to succeed* (See, e.g., *Abrahamson v. Hershman*, 701 F.2d at 228).

Id. at 1406 (emphasis added).

C. *Education is Broadly Defined*

The courts have also made it clear that education for the severely handicapped under the Act is to be broadly defined. In *Battle*, 629 F.2d at 275, the court stated that under the Act, the concept of education is necessarily broad with respect to severely and profoundly handicapped children, and "[w]here basic self help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point." See also *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 176, 183 (3d Cir. 1988) ("the physical therapy itself may form the core of a severely disabled child's special education," and the fact that such a child "may never achieve the goals set in a traditional classroom does not undermine the fact that his brand of education (training in basic life skills) is an essential part of [the Act's] mandate."); *DeLon v. Susquehanna Community School District*, 747 F.2d 149, 153 (3d Cir. 1984) ("[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child . . . is very different from that of a non-handicapped child" and "[t]he program may consist largely of 'related services' such as physical, occupational, or speech therapy"); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983) ("Congress established a priority under the Act for the most severely retarded children, 20 U.S.C. § 1412(3), for many of whom, certainly, education will not consist of classroom training but rather training in very basic skills"); *Kruelle*, 642 F.2d at 693 ("the concept of education is necessarily broad" with respect to severely or profoundly retarded children); *Campbell v. Talladega County Board of Education*, 518 F. Supp. 47, 50 (N.D. Ala. 1981) (the educational programs of children with severe handicaps consist of teaching them "functional" skills); *North v. District of Columbia Board of Education*, 471 F. Supp. 136, 141 (D.D.C. 1979) (in ruling that a school district must provide resi-

dential placement for the severely handicapped plaintiff, the court noted that the educational, social, emotional, and medical problems were so intimately intertwined, it could not separate them); *School District of the Menomonee Area v. Rachel W.*, 1983-1984 EHLR (Education for the Handicapped Law Report) DEC. 505:220, 227 (occupational and physical therapy are to be considered educational services because education for severely handicapped children must be viewed broadly to include related therapies).

In the instant case, the district court's conclusion that education must be measured by the acquirement of traditional "cognitive skills" has no basis whatsoever in the 14 years of case law since the passage of the Act. All other courts have consistently held that education under the Act encompasses a wide spectrum of training, and that for the severely handicapped it may include the most elemental of life skills.

D. *Proof of Benefit Is Not Required*

The district court relied heavily on *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), in concluding that as a matter of law a child is not entitled to a public education unless he or she can benefit from it. The district court, however, has misconstrued *Rowley*. In that case, the Supreme Court held that a deaf child, who was an above average student and was advancing from grade to grade in a regular public school classroom, and who was already receiving substantial specialized instruction and related services, was not entitled, in addition, to a full time sign-language interpreter, because she was already benefiting from the special education and services she was receiving. The Court held that the school district was not required to *maximize* her educational achievement. It stated, "if personalized instruction is being provided with sufficient supportive services to permit the child to

benefit from the instruction, . . . the child is receiving a 'free appropriate public education' as defined by the Act," *id.* at 189, and that "certainly the language of the statute contains no requirement . . . that States maximize the potential of handicapped children." *Id.* at 189.

Rowley focused on the *level* of services and the quality of programs that a *state* must provide, not the criteria for *access* to those programs. *Id.* at 207. The Court's use of "benefit" in *Rowley* was a substantive limitation placed on the state's choice of an educational program; it was not a license for the state to exclude certain handicapped children. In ruling that a state was not required to provide the maximum benefit possible, the Court was *not* saying that there must be proof that a child will benefit before the state is obligated to provide any education at all. Indeed, the Court in *Rowley* explicitly acknowledged Congress' intent to ensure public education to all handicapped children without regard to the level of achievement that they might attain.

Congress expressly 'recognize[d] that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome.*' S. Rep., at 11 [1975 U.S. Code Cong. & Admin. News at 1435]. Thus, the *intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.*

Id. at 192 (emphasis added).

Rowley simply does not lend support to the district court's finding of a benefit/eligibility standard in the Act. As the Court explained, while the Act does not require a school to maximize a child's potential for learning, it does provide a "basic floor of opportunity" for the handicapped, consisting of "access to specialized instruction and related services." *Id.* at 201 (emphasis added).

Nowhere does the Court imply that such a "floor" contains a trap door for the severely handicapped. Indeed, *Rowley* explicitly states: "[t]he Act requires special educational services for children 'regardless of the severity of their handicap,'" *id.* at 181 n.5, and "[t]he Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied." *Id.* at 202. See also *Abrahamson*, 701 F.2d at 227 ("A school committee is required by the Act merely to ensure that the child be placed in a program that provides *opportunity* for some educational progress.") (emphasis added). This is a far cry from a requirement of proof that educational benefit *will definitely result*, before a child is entitled to receive that education.

Two administrative decisions subsequent to the *Rowley* case are also instructive. In *Contra Costa County Consortium*, 1985-1986 EHLR (Education for the Handicapped Law Report) DEC. 507:300, 301, the school district argued that a severely handicapped child with severe cognitive and motor delays (could not speak, voluntarily move his arms or legs, or communicate), was not eligible for special education services because he could not benefit from such a program. The hearing officer held that the child was entitled to the education:

[The *Rowley*] court said the intent of the [Act] was to provide *access to special education for handicapped children without regard to the level of achievement or success of the pupil*. The court in *Rowley* further said that the [Act] provided the "basic floor of opportunity" for availability to and access to special education and related services. The notion that the [Act] intended to open the door to special education and not to limit its availability is found at 20 U.S.C. § 1414(a)(1)(A). The Act is shown to require special education services for children "regardless of the severity of their handicap."

Id. at 507:302 (emphasis added). In *School District of the Menomonie Area v. Rachel W.*, 1983-1984 EHLR DEC. 505:220, 225, the hearing officer held that profoundly handicapped children "may" not be excluded from special education programming solely by virtue of their inability to demonstrate to the satisfaction of the [school] district some undefined quantum of educational benefit resulting from their exposure to such programming." The opinion went on to state:

[*Rowley*] does not support the position that access to special education programming under the EHA is conditioned on the handicapped child's ability to receive an educational benefit from the programming. What is envisioned by the EHA is that the educational programming and related services chosen by the schools will be reasonably calculated to be of some educational benefit to the child. What is not envisioned is that the appropriate educational programming and related services *will* result in an educational benefit being conferred. Special education can no more ensure good results than can regular education.

Id. at 225 (emphasis in original).

And most recently, the Supreme Court, in *Honig v. Doe*, 108 S. Ct. 592 (1988), has made it quite clear that it will not rewrite the language of the Act to include exceptions which are not there. The Court, relying on the plain language and legislative history of the Act, ruled that dangerous and disruptive disabled children were not excluded from the requirement of 20 U.S.C. § 1415(e) (3), that a child "shall remain in the then current educational placement" pending any proceedings, unless the parents consent to a change. The Court rejected the argument that Congress could not possibly have meant to allow dangerous children to remain in the classroom. The analogous holding by the district court in the instant case—that Congress could not possibly have

meant to "legislate futility," i.e. to educate children who could not benefit from it—falls for the reasons stated in *Honig*. The Court concluded that the language and legislative history of the Act was unequivocal in its mandate to educate all handicapped children, with no exceptions. The statute "means what it says," and the Court was "not at liberty to engraft onto the statute an exception Congress chose not to create." *Id.* at 605. As Justice Brennan stated: "We think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school." *Id.* at 604 (emphasis in original). Such a stricture applies with equal force to the case of Timothy W., where the school is attempting to employ its unilateral authority to exclude a disabled student that it deems "uneducable."

The district court in the instant case, is, as far as we know, the only court in the 14 years subsequent to passage of the Act, to hold that a handicapped child was not entitled to a public education under the Act because he could not benefit from the education. This holding is contrary to the language of the Act, its legislative history, and the case law.

V. CONCLUSION

The statutory language of the Act, its legislative history, and the case law construing it, mandate that all handicapped children, regardless of the severity of their handicap, are entitled to a public education. The district court erred in requiring a benefit/eligibility test as a prerequisite to implicating the Act. School districts cannot avoid the provisions of the Act by returning to the practices that were widespread prior to the Act's passage, and which indeed were the impetus for the Act's passage, of unilaterally excluding certain handicapped children from a public education on the ground that they are uneducable.

The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include

not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs. The only question for the school district to determine, in conjunction with the child's parents, is what constitutes an appropriate individualized education program (IEP) for the handicapped child. We emphasize that the phrase "appropriate individualized education program" cannot be interpreted, as the school district has done, to mean "no educational program."

We agree with the district court that the Special Education Act of New Hampshire, N.H. Rev. Stat. Ann. 186-C, implements the federal statute. Its policy and purpose is as unequivocal as that of the federal Act:

It is hereby declared to be the policy of the state that *all children* in New Hampshire be provided with equal educational opportunities. It is the purpose of this chapter to insure that the state board of education and the school districts of the state provide a free and appropriate public education for *all educationally handicapped children*.

N.H. Rev. Stat. Ann. 186-C:1 (emphasis added). For the reasons already stated, we hold that the New Hampshire statute is not subject to a benefit/eligibility test.

The judgment of the district court is reversed, judgment shall issue for Timothy W. The case is remanded to the district court which shall retain jurisdiction until a suitable individualized education program (IEP) for Timothy W. is effectuated by the school district. Timothy W. is entitled to an interim special educational placement until a final IEP is developed and agreed upon by the parties. The district court shall also determine the question of damages.

Costs are assessed against the school district.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

#C-84-733-L

TIMOTHY W.

v.

ROCHESTER SCHOOL DISTRICT

ORDER ON MOTION FOR JUDGMENT ON THE
PLEADINGS OR IN THE ALTERNATIVE,
SUMMARY JUDGMENT

This is a civil rights action commenced pursuant to 42 U.S.C. § 1983. The plaintiff alleges a violation of his rights, guaranteed by the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1400; the Rehabilitation Act, 29 U.S.C. § 793; N.H. R.S.A. 186-C; and the equal protection and due process clauses of the United States and New Hampshire Constitutions.

Pending before the court is the defendant, Rochester School District's Motion for Judgment on the Pleadings or in the alternative, Summary Judgment. The plaintiff has objected to the defendant's motion by way of cross motion for summary judgment.

Before addressing the pending motions, the court will attempt to retrace the turbulent and arduous history of this action.

I. Background

Timothy was born on December 8, 1975 at Frisbie Memorial Hospital in Rochester, two months premature. His mother, Cindy was fifteen years old at the time. He weighed four pounds at birth. Shortly after birth, he was transferred to Mary Hitchcock Hospital in Hanover, New Hampshire, for respiratory difficulties. While at Mary Hitchcock, he suffered intracranial bleeding, hydrocephalus (fluid on the brain), and seizures. He was discharged from Mary Hitchcock after three months, during which time a ventriculoperitoneal shunt was installed to drain excess cranial fluid. By this time, he was diagnosed as suffering from severe developmental retardation, with suspected hearing and vision deficits.

Tim's physical and apparent mental development was dishearteningly slow. He attended the Rochester Child Development Center during the 1979-80 school year, receiving occupational and physical therapy. On February 19, 1980 the school district's pupil evaluation team attempted to determine whether Tim qualified as educationally handicapped under EAHCA. In arriving at a determination, the evaluation team apparently reviewed the plethora of medical evaluations and documented history of Tim. The team also considered the report and observations of therapists as well as instructors. On March 7, 1980 the Rochester School District Placement Committee determined that Tim did not qualify for District sponsored education under EAHCA or R.S.A. 186-C, due to Tim's inability to benefit from special education.

Soon after this determination, Tim began receiving care from the New Hampshire Department of Health and Welfare pursuant to the Social Security Disabled Children's Program. Tim's involvement in this program resulted in the development of an Individualized Service Plan (ISP) which included medical care, physical therapy, tactile stimulation, feeding therapy, and respite care.

In June of 1983, the defendant's evaluation team reassessed Tim's situation concerning qualification for special education pursuant to EAHCA. The evaluation team failed to reach a decision on this issue, and deferred determination pending the acquisition of additional evaluations by neurologists. The School District allegedly sought permission of Tim's mother, in order to perform the neurological evaluation.

On November 19, 1984, Tim, by and through his mother and next friend, filed this action seeking injunctive relief and damages. The relief sought included a temporary restraining order by the court requiring the defendant to place Tim in a special education program at full cost to the defendant; such special education to include an Individualized Education Plan (IEP).

On January 3, 1985, subsequent to an evidentiary hearing, the court denied the plaintiff's request for injunctive relief. On January 8, 1985 the court held the remaining claims concerning alleged violation of EAHCA in abeyance pending exhaustion of administrative procedures. *Timothy W. v. Rochester School District*, No. 84-733 slip op. at 5 (D.N.H. January 8, 1985). In clarifying that ruling the court remanded the case to the New Hampshire Department of Education for an administrative hearing on the issue of whether Tim qualified for special education under EAHCA.

After examining the materials submitted by the parties, the Hearings Officer ruled that Tim qualified for special education under the apposite special education laws. The Hearings Officer held that the special education laws entitle all handicapped children, regardless of the severity of the handicap to special education. The officer further ruled that inquiry as to whether a child might benefit from special education is no longer relevant.

The defendant, pursuant to 20 U.S.C. § 1415(e), appealed the decision of the hearings officer to this court.

by way of a counterclaim filed November 12, 1987. The defendant asserts that the legal conclusion arrived at by the administrative officer was clearly erroneous and that since this legal conclusion precluded any factual determinations concerning the plaintiff, the issue is appropriate for summary disposition.

This appeal presents several issues for the court's consideration. The court must initially determine the correctness of the Administrative Officer's decision concerning the eligibility of special education to all handicapped children, regardless of the ability of a child to benefit from the education. Specifically, the court must decide whether the rights and opportunities propounded by EAHCA, (20 U.S.C. § 1400) provide special education services for all handicapped children, notwithstanding the inability of a child to benefit from the education. Should the court conclude that the EAHCA does not require special education for those handicapped children unable to benefit from the education, the court must examine N.H. R.S.A. 186-C, the state statute implementing the provisions of EAHCA. In examining the statute, the court must determine whether it broadens the application of EAHCA in that it affords special education services to all New Hampshire handicapped children regardless of the severity of the handicap.

If the court rules in the negative as to the foregoing issues, the remaining issue concerns the plaintiff's classification as educationally handicapped under EAHCA and/or R.S.A. 186-C.

III *Analysis*

A. *Education of the Handicapped Act (EHA)*

In passing Education of the Handicapped legislation, Congress defined specific goals.

It is the purpose of this Act to assure that all handicapped children have available to them, within

the time periods specified in section 612(2)(B) [20 USCS § 1412(2)(B)] a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the right of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c).

The Act was intended to "promote" the education of handicapped children who would otherwise be glossed over in the scheme of public education, as a result of their inability to attend "regular class room" instruction due to the nature of the handicap. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 179 (1982). A federal grant program was established which required that participating states develop policies for the implementation of special education programs commensurate with the Act. *Id.* at 181.

In establishing eligibility requirements, Congress went so far as to provide special education for all handicapped children.

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are not currently receiving needed special education and related services;

20 U.S.C. § 2412(2)(6), 1414a(1)(A).

New Hampshire is one of many states participating in this federal grant program and has implemented an education policy which conforms to the requirements of the Act. *See* R.S.A. 186-C.

Despite the language of EAHCA, the defendants contend that Congress' intent in passing the Act was to provide special education for those handicapped children who could benefit from such education. The defendants claim it was not the intent of Congress to provide special education to those children who cannot benefit from that education.

The parties cite a wide variety of authorities in support of their respective positions. These authorities range from Supreme Court rulings to decisions of administrative officers, to law review articles.

There appears to be a split of opinion as to whether EAHCA was intended to mandate that special education be provided to handicapped children regardless of whether or not a child could benefit from the education. For the following reasons, this court concludes that no such mandate was intended by the Act and that an initial determination as to the ability of a handicapped child to benefit from education is requisite.

It is certainly true that the Act provides special public education to all handicapped children, regardless of the severity of the handicap. 20 U.S.C. § 1412(2)(c), 1414 a (1)(A). Does this mean that if a child suffers from a handicap of such severity that the child is incapable of cognitive learning, that child is to be the subject of attempted education? This court will not support such a proposition.

Both parties allude to *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982). *Rowley* is a case in which the court addressed the issue of what was intended as a "free appropriate education" under the terms of EAHCA. *Id.* at 186. It has been so extensively cited by the parties in this action that its interpretation seems as important as does that of the statute itself.

In reviewing the impetus behind the EAHCA legislation, *Rowley* recognized two Federal District Court deci-

sions as significant. *Id.* at 192. The cases were *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D.Pa. 1971) (*PARC*) and *Mills v. Board of Ed. of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) (*Mills*). Both cases involved a denial by state school systems of public educational opportunities for handicapped children. *Id.* In both instances the court required that the state give handicapped children "access to an adequate, publicly supported education." *Rowley*, 458 U.S. at 193. In analyzing these cases, the court acknowledged the attention which these decisions received in the legislative reports.

— The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having "incorporated the major principles of the right to education cases." S. Rep., at 8. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. H.R. Rep., at 5.

Id. at 194 (footnote omitted)

The *Rowley* court analyzed the *PARC* and *Mills* cases in order to identify what was meant by an "appropriate public education." In considering the *PARC* case the court recognized *PARC* as holding that school systems are to "provide access to a free public program of education and training appropriate to [the student's] learning capacities." *Rowley*, 458 U.S. at 193, n. 15.

— In deciding the issue of "free appropriate public education" under the Act, the Court held that this phrase requires "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to

'benefit' from the instruction." *Rowley*, 458 U.S. at 188-189.

It logically follows that a handicapped child who cannot "benefit" from special education, or who does not have learning capacity (*Mills*, 334 F. Supp. at 1258) was not intended to receive special education under the EAHCA. Surely, Congress would not legislate futility!

As previously mentioned, this interpretation of EAHCA is not unique, since there exists a number of contrasting decisions concerning the necessity of a potential benefit to exist as a precondition to a child's entitlement to special education under the Act. The case of *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985) is germane to this action in two respects. The case describes a series of hypothetical situations involving the EAHCA, and it also provides an interpretation of *Rowley*, concerning the very issue confronting this court. *Parks*, 753 F.2d at 1404-5.

In analyzing the special education requirements of EAHCA in light of the potential types of handicaps with which a school district may be faced, the court identified three hypothetical situations, representing the minimum, the maximum, and the mean handicapped child situation which could confront a school district. *Id.* The entire analysis is noteworthy, however, it is the hypothetical addressing of the maximum handicap which is of import to this action.

In our second hypothetical case, the child is in a coma, and is institutionalized because he cannot be cared for at home. We understand the plaintiffs to be conceding (and the Supreme Court's opinion in *Rowley* implies, see 458 U.S. at 202-203, 102 S. Ct. at 3048-49) that since the child would be completely uneducable in his condition—since he could not benefit from special education no matter how

expensive—his living expenses in the institution would not be chargeable to the state under the Act. They would not be expenses of or related to education, made pursuant to the “individualized education program” that the law requires the state to create for each handicapped child.

Id. at 1405.

It is clear that implicit in *Park's* interpretation of *Rowley* is the necessity of a child to possess an ability to benefit or be capable of benefitting from special education, prior to qualifying for such education under EAHCA.

This same approach was used years earlier by the Federal District Court for the Eastern Division of Virginia. *Matthews v. Campbell*, 3 EHLR 551:264 (E.D. Va. 1979). In addressing the issue of special education and its supposed requisite beneficial effect, the *Mathews* court reviewed the legislative history of EAHCA.

At least one commentator has observed that the “Act contains no exclusions for exceptionally severe handicaps.” Krass. *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. of Ill. L.F. 1016, 1074. The Court, however, may be faced with considering if there are any reasonable exceptions from this absolute position. A reading of the legislative history suggests that Congress was primarily concerned with handicapped children who, despite their limitations, are capable in some ways of learning and even of being creative and productive. The instant plaintiff, regrettably, almost certainly does not fall in this category.

Although other authority exists for concluding that a handicapped child must necessarily be capable of benefitting from education in order to qualify for special

education under EAHCA, those cases merely serve to reiterate the same theme.

The court is not [un]aware of those decisions which interpret EAHCA literally, requiring states participating in the EAHCA grant to provide special education to handicapped students regardless of their capacity to benefit from the education. *Abrahamson v. Hersham*, 701 F.2d 223 (1st Cir. 1983); *Kruelle v. New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981). However, most of these cases predate *Rowley* with the exception of *Abrahamson*. *Id.* The interesting aspect of the *Abrahamson* case is that it recognizes *Rowley* as placing a "beneficial" limitation on special education under EAHCA.

The only substantive limitations Congress placed on the states were the requirements that the policy chosen provide the handicapped child with some educational benefit, *Rowley*, and conform to the Act's mainstreaming requirements.

Id. at 229.

Therefore this court concludes that under EAHCA, an initial determination as to a child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act. This determination is necessary to close that gap which is not explicit in the Act, and which involves those rare (and the court emphasizes rare) cases where a child is afflicted by such extreme handicap(s) that the child is not capable of benefitting from special education.

B. R.S.A. 186-C

As mentioned previously, the State of New Hampshire undertook participation in the EAHCA federal grant program, and implemented conforming legislation now codified as N.H.R.S.A. 186-C. The purpose of the statute is as follows:

It is hereby declared to be the policy of the state that all children in New Hampshire be provided with equal educational opportunities. It is the purpose of this chapter to insure that the state board of education and the school districts of the state provide a free and appropriate public education for all educationally handicapped children.

R.S.A. 186-C:1

The goal and purpose of the statute, as alleged by the defendant, are essentially identical to that of the EAHCA. See 20 U.S.C. § 1400. This is by no means surprising since one statute was intended to implement the other. *Petition of Milan School Dist.*, 123 N.H. 227 (1983). In developing a policy which conforms to the federal legislation, a state may be beyond the bounds of that legislation by providing greater benefits to handicapped children. *David D. v. Dartmouth School Committee*, 775 F.2d 411, 419-20 (1st Cir. 1985).

In his decision concerning special education and the need to establish a benefit prior to providing this education, the Hearings Officer noted that R.S.A. 186-A:6 formerly contained language which included "capable of being benefitted from instruction" standard. It was apparently the absence of this language in the present statute which prompted the administrative officer to rule that under EAHCA and R.S.A. 186-C, a handicapped child is entitled to special education regardless of the child's ability to benefit from the education.

However, a review of the legislative history of the statute fails to reveal any legislative intent to exclude consideration of a child's ability to benefit from special education prior to providing such education. The plaintiff suggests that statutory interpretation under the laws of New Hampshire requires the interpreter to presume that the legislature "will not do an idle and meaningless act." *Kalloch v. Board of Trustees*, 116 N.H. 443, 445

(1976). However, it should also be presumed that the legislature will not do an act which leads to an absurd result. *Id.*, (citing *State v. Woodman*, 114 N.H. 497 (1974)). This court has already characterized an attempt to educate an individual incapable of benefitting from the education as futile. In this regard, the court equates futility with absurdity.

The court will not interpret R.S.A. 186-C to suggest that handicapped children who cannot benefit from special education, are entitled to receive this education. Under New Hampshire law, an initial decision must be made concerning the ability of a handicapped child to benefit from special education before an entitlement to the education can exist.

In drawing this conclusion, the court emphasizes that any initial decisions shall not be arbitrary or capricious but shall be the result of extensive and appropriate evaluations and examinations. The court accepts the defendant's assertion that the burden of proving a handicapped child incapable of benefitting from special education shall be upon the party alleging that the child cannot benefit from special education.

C. *Timothy W.'s Qualification as Educationally Handicapped*

The court has circumspectly reviewed the evidence and submitted materials pertaining to Timothy W.'s entitlement to special education under the EAHCA and R.S.A. 186-C.

On June 16, 1988 the court heard additional testimony from individuals on the matter of Timothy W.'s ability to benefit from special education. The first witness to testify on behalf of the defendants was Dr. Patricia Andrews of the New Hampshire Department of Education, Special Education Bureau.

Dr. Andrews, a medical doctor with much expertise relating to profoundly retarded children testified at some length regarding Timothy W.'s past, present and future prognosis. Since 1985 she has observed Timothy W.

The file and past evidence introduced in this case amply and graphically portray Timothy W.'s condition both physically and mentally.

Dr. Andrews has seen Timothy W. on three occasions. Her physical evaluation is that he is blind, deaf, has cerebral palsy, is spastic and subject to convulsions, has lack of cartoid tissues, and is profoundly retarded. She believes that learning is non-existent. Quoting her testimony, "Timothy W. has little or no potential for learning."

Summarizing, Timothy W. has severe spasticity, brain damage, joint contractures, dislocated hips, scoliosis, is not ambulatory, a quadriplegic and cortically blind. His oral feeding is reflexive. In one forty-five minute period of observation, Dr. Andrews noted eight seizures. Timothy W. grimaces, smile is the same, and makes no sounds.

Dr. Andrews opines that there is no likelihood that Timothy W. will acquire academic skills or be able to care for himself and does not have communication skills. The highest level of reflex behavior has been acquired by Timothy W. He needs physical and occupational therapy. He is currently operating at the brainstem level.

Dr. Andrews was very candid and stated on cross-examination that the issue of educationally handicapped was not her prerogative.

The next witness to testify was Carrie Foss, a registered nurse, specializing in treating handicapped children. She met Timothy W. when he was two years old. His mother was very young and needed help. The child

had poor attendance at the Rochester Development Center which is now the Strafford County Center.

She observed him every day at varying times while they were both at the Center. In her opinion, tests showed no progress or improvement and since March, 1987 Timothy W. has regressed. She noted more congestion, no useable vision, seizures and constant positioning every 20 to 30 minutes.

Kathleen Schwaninger, a New York based consultant for United Cerebral Palsy, testified to years of involvement in working with individuals suffering from either mental or physical handicaps or some combination of the two.

Kathleen Schwaninger had an opportunity to examine Timothy W. on two separate occasions, June 7&8, 1988. Her observations of Timothy W. lasted approximately two hours on each occasion. In addition to making observations of Timothy W., Kathleen Schwaninger reviewed Timothy W.'s progress reports for the periods January through March, and March through June of 1988. Prior review of Tim's Individualized Education Plan (IEP) was indicated by the witness as well.

Kathleen Schwaninger premised her testimony by noting and explaining the sometimes divergent perspectives of the medical and teaching professions, when assessing the cognitive learning abilities of handicapped children. The witness identified the divergency for the purpose of explaining the inconsistent conclusions reached by various medical and teaching personnel who have examined Timothy W. in order to determine his ability to benefit from education.

Although Kathleen Schwaninger did not dispute the medical evidence concerning Timothy W.'s cortical development or visual and auditory impairments, she did dispute its impact on the opinions of the medical examiners.

Without listing each and every reason cited by Kathleen Schwaninger in support of her position, she is of the opinion that Timothy W. is capable of benefitting from special education. However, due to the severity of Timothy W.'s handicap, Kathleen Schwaninger noted that an IEP developed for Tim, would have to be carefully tailored with an end toward very limited goals. According to Kathleen Schwaninger, these goals should be aimed at developing the most basic self-survival capabilities. Kathleen Schwaninger is also of the opinion that all handicapped children are capable of benefitting from special education regardless of the severity of the handicap.

On June 27, 1988, this court heard more testimony concerning Timothy W.'s current educational assessment from Rose Bradder, a teacher at the Child Development Center of Strafford County. Ms. Bradder is responsible for monitoring Timothy W.'s child programming. As a result of her position, Ms. Bradder has had an opportunity to make extensive observations of Timothy W. and to draw certain conclusions concerning Tim.

It should be noted that Ms. Bradder subscribes to the belief that all children, regardless of the extent of the handicap(s) with which they are afflicted, can benefit from education. She believes that all severely handicapped and profoundly retarded children, are educationally handicapped for the purpose of EAHCA.

In specifically reviewing Ms. Bradder's testimony pertaining to Timothy W., it is clear that she believes Tim can benefit from an educational plan, and has indicated a number of reasons upon which she bases this premise. Bradder considers Tim to possess an ability to differentiate between light and dark. She relates that he will generally cry when left in the dark and stop crying when light is returned. One of the many evaluating tests ad-

ministered requires that Tim remain in a dark room in which a "light box" is placed. Once the room is darkened, the "box" is lighted and certain observations concerning Tim's response are recorded. Ms. Bradder relates that Tim will turn toward the light within a short period of time. Ms. Bradder noted that verbal prompts from the direction of the light often accompany the evaluation.

In assessing Timothy W.'s ability to benefit from educational services, Ms. Bradder testified that a variety of auditory and visual stimuli are used. In order to gauge Timothy W.'s performance in response to stimuli, certain "base line" levels of performance were established. Although Ms. Bradder suggested that an optimistic reading of the reports and evaluation charts indicate an overall growth in performance, she candidly admits that Timothy W. never achieved a level of performance beyond his "base line."

The majority of Timothy W.'s activities are classified as passive, non-volitional. Even those activities designated as partial involvement, require manipulation of Timothy W.'s extremities by a third party. The testimony revealed that these types of activities require complete manipulation of Tim's hands and feet. This is known as "hand over hand manipulation," without which Timothy W. could not perform an activity such as eating.

Ms. Bradder indicated that another example of Timothy W.'s ability to benefit from education is an increase in his tolerance level to certain activities such as rocking. Periodically, an individual will hold Tim and begin to gently rock him side to side. Notations are made as to the number of times Tim will be rocked before he begins to cry. According to Ms. Bradder, Tim has apparently increased his tolerance to his rocking activity.

Ms. Bradder also noted that a further indication of Tim's ability to benefit from education, is his response

to auditory stimulation by way of head movement. An individual will stand directly in front of Tim and speak to him. This is referred to as the midline position. Evaluators observe the nature of Tim's head movement and determine whether he is responding to the noise, and if so, how often he responds. Ms. Bradder testified that Tim's response, in her opinion, was resultant from the auditory stimulation. However, her reports revealed that Tim responded to this type of stimuli approximately 4 out of 100 attempts.

Although Ms. Bradder believes that no test could adequately determine Tim's ability to learn or benefit from education, she does acknowledge that the Callier-Azusa Scale for Deaf-Blind Children, indicates that Tim is performing at a splinter skill level or basic skill level. Ms. Bradder additionally acknowledged that any activities performed by Tim are done at a reflexive level. Ms. Bradder indicated that she personally believed Tim to have made purposeful movements on at least two occasions.

An area in which Tim seems to have achieved progress, if any, is eating skills. Ms. Bradder testified that Tim is able to indicate choice by spitting out certain foods placed in his mouth. However, Ms. Bradder did inform the court of at least one doctor's recommendation that Tim receive in-house hospitalization to monitor, among other things, the amount of food which is ingested into Tim's lungs during the feeding process.

Finally, Ms. Bradder related that currently Tim is physically contracted to such a degree that even passive non-volitional activity is severely restricted. Ms. Bradder is of the opinion that, should an individualized educational program be developed for Tim, physical and occupational therapy must be incorporated into the program.

The court also notes the report of Dr. Stephen Calculator, Ph.D, CCC-Sp., a speech language pathologist, con-

cerning Tim's educational requirements. Although it appears that Dr. Calculator did not personally examine Tim, his evaluation suggests that the defendant should "continue to provide an instructional environment sensitive to Tim's needs for affection and nurture." The court finds it interesting that although a speech-language pathologist, Dr. Calculator never commented in his report on Tim's progress or potential progress in the areas of speech and/or oral communication.

With due respect to those opinions which conclude that Timothy W. is capable of benefitting from a program of special education, this court considers the evidence before it, as illustrative of a bleak and sympathetic life for the boy who is actually the concern of all the parties to this litigation. The court has reviewed the evidence thoroughly. A heart wrenching hour of video tape observation was endured. To characterize Timothy W. as profoundly retarded and severely handicapped seems to unjustly encapsulate the magnitude of his problems.

This court has come to the regrettable conclusion that Timothy W. is not capable of benefitting from special education. The defendant has carefully and conscientiously attempted to evaluate Timothy's potential for learning. This potential seems non-existent. As a result, the defendant is not obligated to provide special education under either EAHCA or R.S.A. 186-C. The greatest service, in this court's view, that society can do for Timothy W. is to alleviate his pain(s) and suffering(s) and provide him a comfortable and secure living environment.

The human existence is not machine-like or robotic. Torsos, limbs, brains, minds and awareness are capable of development. By determining that Timothy W. cannot at this time, benefit from special education, the court does not obviate an opportunity to such education indefinitely. This child must be subject to continuous, but periodic evaluations, intended to identify any develop-

ment which illustrates a capability to benefit from special education.

The defendant has suggested that the interpretation of R.S.A. 186-C be certified to the New Hampshire Supreme Court. The defendant has also suggested that the case be mandated to the administrative level for factual findings concerning Timothy W.'s ability to benefit from special education. Both of these suggestions are noted and denied.

Conclusion

[I]t is the function of summary judgment, in the time hallowed phrase, "to pierce formal allegations of facts in the pleadings . . .", *Schreffler v. Bowles*, 153 F.2d 1, 3 (10th Cir. 1946), and to determine whether further exploration of the facts is necessary. *Briggs v. Kerrigan*, 431 F.2d 967, 968 (1st Cir. 1970).

The language of Rule 56 (c) sets forth a bifurcated standard which the party opposing summary judgment must meet to defeat the motion. He must establish the existence of an issue of fact which is both "genuine" and "material". A material issue is one which affects the outcome of the litigation. To be considered "genuine" for Rule 56 purposes a material issue must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Service Co. Inc.*, 391 U.S. 253, 289. The evidence manifesting the dispute must be "substantial", *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co., Inc.*, 149 F.2d 359, 362 (5th Cir. 1945) going beyond the allegations of the complaint.

Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

Summary judgment should be granted where the evidence is such that it "would require a directed verdict granted for the moving party." *Sortor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

After an in depth review of the pleadings and associated materials, in addition to consideration of the evidence presented at the hearings, the court hereby grants the defendant's motion for summary judgment (Doc. #92) consistent with the context of this order.

July 15, 1988

/s/ Martin F. Loughlin
MARTIN F. LOUGHLIN
U.S. District Judge

APPENDIX C

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

TIMOTHY W.

v.

ROCHESTER SCHOOL DISTRICT

HEARING OFFICER'S DECISION

I. *Background*

Timothy W. (DOB 12/8/75) is a profoundly handicapped child. He has very little cortical tissue and functions primarily at a brainstem level. The brainstem controls respiration, heartbeat, and other physiological processes. He is nearly blind but appears to distinguish light from dark. Although sometimes diagnosed as deaf, he apparently can hear. He has very little control over his muscles and functions mostly at a reflex level. Most observers place his development age at between zero and three to six months. He has been well cared for at home by his mother, Cindy W., since his birth. He has never been offered educational services by the Rochester School District (District) except for some diagnostic evaluations.

II. *Issue*

The District claims that it is not responsible for providing educational services to Timothy because, in its opinion, Timothy is not capable of benefitting from special education. The District asserts that children who are not capable of benefitting from special education cannot

be coded educationally handicapped. Cindy W. has asked the District to code Timothy educationally handicapped and to provide him with an individual education program (IEP).

The parties submitted prehearing memoranda on the issue of whether a handicapped child must be deemed capable of benefitting from special education before he or she can be coded educationally handicapped. No hearing was held on the issue.

III. *Decision*

The state and federal laws pertaining to special education require that all children, regardless of the severity of their handicap, be provided with educational services. "It is hereby declared to be the policy of the state that *all* children in New Hampshire be provided with equal educational opportunities." RSA 186-C:1 (emphasis added). "State and local educational agencies have a responsibility to provide education for *all* handicapped children. . . ." 20 U.S.C. § 1400 (b) (8) (emphasis added). "It is the purpose of [the Education of the Handicapped Act, (hereinafter EHA or ACT)] to assure that *all* handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of *all* handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." 20 U.S.C. § 1400 (c) (emphasis added). See also 20 U.S.C. § 1412. There are no references in the statutes to the standard the District wishes to adopt. The "capable of being benefitted from instruction" standard was once a part of New Hampshire's special education statute. RSA 186-A:6 (repealed). The legislature has since removed that reference. See, RSA 186-C:1 *et seq.*

Upon passage of the EHA in 1975, Congress found that "more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity. . . .[and] one million of the handicapped children are excluded entirely from the public school system. . . ." 20 U.S.C. §§ 1400 (b) (3); (b) (4).

The key to the language of the New Hampshire statute is the phrase "equal educational opportunities." RSA 186-C:1; See also, 20 U.S.C. § 1400 (b) (3). Undoubtedly, many handicapped, as well as many non-handicapped children, have failed to meet the expectations set for them by the District. However, the District continues to meet its obligation to provide educational opportunities for those children. The District wishes to treat Timothy differently because of the severity of his handicap. It wishes to have adopted a standard that permits the District to withhold services from Timothy because, based on the nature and severity of his handicap, the District has determined that he will fail. The law does not permit the District to withhold educational services based upon the nature or severity of a child's handicap. The District is charged with providing equal educational opportunities for all children. RSA 186-C:1; 20 U.S.C. § 1400 *et seq.* Timothy might fail, but he also might succeed in grasping the education provided to him by the District. The EHA and state law have been designed to give every handicapped child a chance to benefit from a public education. To date, the District has not given Timothy that chance. He deserves the same opportunity as every other handicapped child. The District is to provide Timothy with a free appropriate public education.

Either party may appeal this decision according to ED 1127.02 of the *New Hampshire Standards for the Education of Handicapped Students*. This decision shall be fully implemented in thirty days. ED 1127.02 (d). Within ninety days the District shall provide to the Com-

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missioner of Education a written report describing the implementation of this decision and provide a copy of the report to Cindy W. Ed 1127.02 (e).

Dated: 10-14-87

/s/ Quentin Blaine
QUENTIN BLAINE
- Special Education Hearing Officer

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1847

TIMOTHY W. ETC.,
Plaintiff, Appellant,
v.

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Defendant, Appellee.

JUDGMENT

Entered: May 24, 1989

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed, judgment shall issue for Timothy W. The case is remanded to the district court which shall retain jurisdiction until a suitable individualized education program (IEP) for Timothy W. is effectuated by the School district. Timothy W. is entitled to an interim special educational placement until a final IEP is developed and agreed upon by the parties. The district court shall also determine the question of damages.

Costs are assessed against the school district.

By the Court:

Clerk.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1847

TIMOTHY W. ETC., *et al.*,
Plaintiffs, Appellants,

v.

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Defendant, Appellee.

Before

CAMPBELL, *Chief Judge*,
ALDRICH, BOWNES, BREYER, TORRUELLA
and SELYA, *Circuit Judges.*

ORDER OF COURT

Entered: June 30, 1989

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing submitted by appellee, and appellee's suggestion for rehearing or reconsideration en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en Banc,

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It is ordered that the petition for rehearing and the suggestion for rehearing or reconsideration en banc be hereby denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

By _____
Chief Deputy Clerk

APPENDIX F

CHAPTER 33—EDUCATION OF HANDICAPPED

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the “Education of the Handicapped Act”.

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected.

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expenses;

(7) developments in the training of teachers and in diagnostic and instructional procedures and meth-

ods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1401. Definitions

(a) As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Repealed.

(3) Repealed.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there

is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978.

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting

agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine which particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read,

write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipated duration of such services, and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or

secondary school student, as may be appropriate, and which shall be computed after deducting—

(A) amounts received—

(i) under this part,

(ii) under chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2701 et seq.], or

(iii) under title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 3281 et seq.], and

(B) any State or local funds expended for programs that would qualify for assistance under such part, chapter, or title.

(21) The term “native language” has the meaning given that term.

(22) The term “intermediate educational unit” means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(23) (A) The term “public or private nonprofit agency or organization” includes an Indian tribe.

(B) The terms “Indian”, “American Indian”, and “Indian American” mean an individual who is a member of an Indian tribe.

(C) The term “Indian tribe” means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act).

(b) For purposes of subchapter III of this chapter, "handicapped youth" means any handicapped child (as defined in subsection (a) (1) of this section) who—

- (1) is twelve years of age or older; or
- (2) is enrolled in the seventh or higher grade in school.

§ 1402. Office of Special Education Programs

(a) Administration and execution of programs and activities

There shall be, within the Office of Special Education and Rehabilitative Services in the Department of Education, an Office of Special Education Programs which shall be the principal agency in the Department for administering and carrying out this and other programs and activities concerning the education and training of the handicapped.

(b) Deputy Assistant Secretary: selection and supervision, General Schedule and Senior Executive Service status; Associate Deputy Assistant Secretary and minimum assistantships: establishment, General Schedule status

(1) The office established under subsection (a) of this section shall be headed by a Deputy Assistant Secretary who shall be selected by the Secretary and shall report directly to the Assistant Secretary for Special Education and Rehabilitative Services. The position of Deputy Assistant Secretary shall be in grade GS-18 of the General Schedule under section 5104 of Title 5 and shall be a Senior Executive Service position for the purposes of section 3132(a) (2) of such Title.

(2) In addition to such Deputy Assistant Secretary, there shall be established in such office not less than six positions for persons to assist the Deputy Assistant Secretary, including the position of the Associate Deputy

Assistant Secretary. Each such position shall be in grade GS-15 of the General Schedule under section 5104 of Title 5.

§ 1403. Repealed.

§ 1404. Acquisition of equipment and construction of necessary facilities

(a) Authorization for use of funds

In the case of any program authorized by this chapter, if the Secretary determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, the Secretary may authorize the use of such funds for such purposes.

(b) Recovery of payments under certain conditions

If, within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which the facility is situated.

§ 1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

§ 1406. Grants for removal of architectural barriers; authorization of appropriations

(a) The Secretary is authorized to make grants and to enter into cooperative agreements with the Secretary of the Interior and with State educational agencies to assist such agencies in making grants to local educational agencies or intermediate educational units to pay part or all of the cost of altering existing buildings and equipment in accordance with standards promulgated under the Act entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved August 12, 1968.

(b) For the purposes of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

§ 1407. Regulation requirements

(a) Effective date

For purposes of complying with section 1232(b) of this title with respect to regulations promulgated under subchapter II of this chapter, the thirty-day period under such section shall be ninety days.

(b) Congressional intent with respect to lessening procedural or substantive protections in effect on July 20, 1983

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to handicapped children under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at indi-

vidualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

§ 1408. Eligibility for financial assistance

Effective for fiscal years for which the Secretary may make grants under section 1419(b)(1) of this title, no State or local educational agency or intermediate educational unit or other public institution or agency may receive a grant under subchapters III through VII of this chapter which relate exclusively to programs, projects, and activities pertaining to children aged three to five, inclusive, unless the State is eligible to receive a grant under section 1419(b)(1) of this title.

SUBCHAPTER II—ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

§ 1411. Entitlements and allocations

(a) Formula for determining maximum State entitlement

(1) Except as provided in paragraph (3) and in section 1419 of this title, the maximum amount of the grant to which a State is entitled under this subchapter for any fiscal year shall be equal to—

(A) the number of handicapped children aged 3-5, inclusive, in a State who are receiving special education and related services as determined under paragraph (3) if the State is eligible for a grant under section 1419 of this title and the number of handicapped children aged 6-12, inclusive, in a State who are receiving special education and related services as so determined;

multiplied by—

(B) (i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expendi-

ture in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this subchapter for the fiscal year ending September 30, 1977.

(2) For the purpose of this subsection and subsection (b) through subsection (e) of this section, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure", in the United States,

means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5) (A) In determining the allotment of each State under paragraph (1), the Secretary may not count—

(i) handicapped children aged three to seventeen, inclusive, in such State under paragraph (1) (A) to the extent the number of such children is greater than 12 percent of the number of all children aged three to seventeen, inclusive, in such State and the State serves all handicapped children aged three to five, inclusive, in the State pursuant to State law or practice or the order of any court,

(ii) handicapped children aged five to seventeen, inclusive, in such State under paragraph (1) (A) to the extent the number of such children is greater than 12 percent of the number of all children aged five to seventeen, inclusive, in such State and the State does not serve all handicapped children aged three to five, inclusive, in the State pursuant to State law or practice or the order of any court; and

(iii) handicapped children who are counted under subpart 2 of part D of chapter 1 of title 1 [20

U.S.C.A. § 2791 et seq.] of the Elementary and Secondary Education Act of 1965.

(B) For purposes of subparagraph (A), the number of children aged three to seventeen inclusive, in any State shall be determined by the Secretary on the basis of the most recent satisfactory data available to the Secretary.

(b) Distribution and use of grant funds by States for fiscal year ending September 30, 1978

(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1978—

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 1412(3) of this title.

(2) Of the funds which any State may use under paragraph (1) (A)—

(A) an amount which is equal to the greater of—

(i) 5 per centum of the total amount of funds received under this subchapter by such State; or

(ii) \$200,000;

may be used by such State for administrative costs related to carrying out sections 1412 and 1413 of this title;

(B) the remainder shall be used by such State to provide support services and direct services, in ac-

cordance with the priorities established under section 1412(3) of this title.

- (c) Distribution and use of grant funds by States for fiscal years ending September 30, 1979, and thereafter

(1) Of the funds received under subsection (a) of this section by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) except as provided in paragraph (4), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) of this section to local educational agencies and intermediate educational units in such state, for use in accordance with priorities established under section 1412(3) of this title.

(2) (A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1) (A)—

(i) an amount which is equal to the greater of—

(I) 5 per centum of the total amount of funds received under this subchapter by such State; or

(II) \$350,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 1412 and 1413 of this title; and

(ii) the part remaining after use in accordance with clause (i) shall be used by the State (I) to provide support services and direct services in accordance with the priorities established under section

1412(3) of this title, and (II) for the administrative costs of monitoring and complaint investigation but only to the extent that such costs exceed the costs of administration incurred during fiscal year 1985.

(B) The amount expended by any State from the funds available to such State under paragraph (1) (A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

(3) The provisions of section 1413(a) (9) of this title shall not apply with respect to amounts available for use by any State under paragraph (2).

(4) (A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

(i) such local educational agency or intermediate educational unit is entitled, under subsection (d) of this section, to less than \$7,500 for such fiscal year; or

(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 1414 of this title.

(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2) (B) shall not apply to the use of such funds.

(d) Allocation of funds within States to local educational agencies and intermediate educational units

From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b) (1) (B) or subsection (c) (1) (B) of this section, as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b) (1) (B) or subsection (c) (1) (B) of this section, as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this subchapter.

(e) Territories and possessions

(1) The jurisdiction to which this subsection applies are Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Secretary in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this subchapter for that fiscal year. If the aggregate of the amounts, determined by the Secretary pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per

centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or \$35,000, whichever is greater.

(f) Indian reservations

(1) The Secretary shall make payments to the Secretary of the Interior according to the need for assistance for the education of handicapped children on reservations served by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall be 1.25 percent of the aggregate amounts available to all States under this section for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under paragraph (1) only after submitting to the Secretary an application which—

(A) meets the applicable requirements of sections 1412, 1413, and 1414(a) of this title,

(B) includes satisfactory assurance that all handicapped children aged 3 to 5, inclusive, receive a free appropriate public education by or before the 1987-1988 school year,

(C) includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and designated local school boards before adoption of the policies, programs, and procedures required under sections 1412, 1413, and 1414(a) of this title, and

(D) is approved by the Secretary.

Section 1416 of this title shall apply to any such appli-

(g) Reductions or increases

(1) If the sums appropriated under subsection (h) of this section for any fiscal year for making payments to States under subsection (a) of this section are not sufficient to pay in full the total amounts which all States are entitled to receive under subsection (a) of this section for such fiscal year, the maximum amounts which all States are entitled to receive under subsection (a) of this section for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d) of this section, which it estimates that it will expend in accordance with the provisions of this section. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this subchapter, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this

section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(h) For grants under subsection (a) of this section there are authorized to be appropriated such sums as may be necessary.

§ 1412. - Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later

than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are

receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a) (5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any

other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the pro-

visions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Act of 1965 and section 2332(1) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for—

(A) the development and implementation of a comprehensive system of personnel development, which shall include—

(i) inservice training of general and special educational instructional and support personnel,

(ii) detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and

(iii) effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from

educational research, demonstration, and similar projects, and

(B) adopting, where appropriate, promising educational practices and materials developed through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that—

(i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the

rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for—

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter—

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or

concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which—

(A) advises the State educational agency of unmet needs within the State in the education of handicapped children,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of the responsibilities of the Secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement; and

(14) set forth policies and procedures relating to the establishment and maintenance of standards to

ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) (1) Notice and hearing prior to disapproval of plan

The Secretary shall approve any State plan and any modification thereof which—

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (1), but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) Participation of handicapped children in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a) (4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirement of subsection (a) (4) of this section.

(2) (A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount

the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a) (4) of this section.

(3) (A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his action, as provided in section 2112 of Title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action

of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

- (e) Reduction of medical and other assistance or alteration of eligibility under social security provisions prohibited.

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for handicapped children within the State.

§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

- (1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

- (A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413 (a) (3) of this title;

(ii) the provisions of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5) (B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that—

(A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

(i) shall be used to pay only excess costs directly attributable to the education of handicapped children; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds; and

(C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction that are not receiving funds under this subchapter;

(3) provide for—

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participat-

ing in programs carried out under this subchapter; and

- (B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A) ;

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5) (B), 1412(5) (C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2) (A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416 (a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any

notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2) (A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with

joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

- (d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are pro-

vided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a) (2) (B) (ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411 (d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which

receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or

training with respect to the problems of handicapped children,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction; attorney fees

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the

preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) (A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceedings brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian

is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that—

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under

such laws seeking relief that is also available under this subchapter, the procedures under subsections (b) (2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

§ 1416. Withholding of payments; judicial review

(a) Whenever the Secretary, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan, the Secretary—

(A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and

(B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a) (2) of this title within the Secretary's jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children.

If the Secretary withholds further payments under clause (A) or clause (B) the Secretary may determine that

such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Secretary is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within the Secretary's jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b) (1) If any State is dissatisfied with the Secretary's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings upon which the Secretary's action was based, as provided in section 2112 of Title 28.

(2) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

§ 1417. Administration

(a) Duties of Secretary

(1) In carrying out the Secretary's duties under this subchapter, the Secretary shall—

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975 and every year thereafter, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

(d) Hiring of qualified personnel

The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out the Secretary's duties under subsection (a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

§ 1418. Evaluation

(a) Duties of Secretary

The Secretary shall, directly or by grant, contract, or cooperative agreement, collect data and conduct studies, investigations, and evaluations—

(1) to assess progress in the implementation of this chapter;

(2) to assess the impact and effectiveness of State and local efforts, and efforts by the Secretary of the Interior, to provide—

(A) free appropriate public education to handicapped children and youth; and

(B) early intervention services to handicapped infants and toddlers; and

(3) to provide—

(A) Congress with information relevant to policymaking; and

(B) State, local, and Federal agencies, including the Department of the Interior, with information relevant to program management, administration, and effectiveness with respect to such education and early intervention services.

(b) Collection of data on education of handicapped infants, toddlers, children and youth; additional information

In carrying out subsection (a) of this section, the Secretary, on at least an annual basis, shall obtain data concerning programs and projects assisted under this chapter and under other Federal laws relating to handicapped infants, toddlers, children, and youth, and such additional information, from State and local educational agencies, the Secretary of Interior, and other appropriate

sources, as is necessary for the implementation of this chapter including—

(1) the number of handicapped infants, toddlers, children, and youth in each State receiving a free appropriate public education or early intervention services—

(A) in age groups 0-2 and 3-5, and

(B) in age groups 6-11, 12-17, and 18-21, by disability category,

(2) the number of handicapped children and youth in each State who are participating in regular educational programs (consistent with the requirements of section 1412 (5) (B) of this title and 1414(a) (1) (C) (iv) of this title) by disability category, and the number of handicapped children and youth in separate classes, separate schools or facilities, or public or private residential facilities, or who have been otherwise removed from the regular education environment,

(3) the number of handicapped children and youth exiting the education system each year through program completion or otherwise—

(A) in age group 3-5, and

(B) in age groups 6-11, 12-17, and 18-21, by disability category and anticipated services for the next year,

(4) the amount of Federal, State, and local funds expended in each State specifically for special education and related services and for early intervention services (which may be based upon a sampling of data from State agencies including State and local educational agencies),

(5) the number and type of personnel that are employed in the provision of special education and related services to handicapped children and youth

and early intervention services to handicapped infants and toddlers by disability category served, and the estimated number and type of additional personnel by disability category needed to adequately carry out the policy established by this chapter, and

(6) a description of the special education and related services and early intervention services needed to fully implement this chapter throughout each State, including estimates of the number of handicapped infants and toddlers in the 0-2 age group and estimates of the number of handicapped children and youth—

(A) in age group 3-5, and

(B) in age groups 6-11, 12-17, and 18-21,
and by disability category.

(c) Evaluation studies by grant, contract, or cooperative agreement

The Secretary shall, by grant, contract, or cooperative agreement, provide for evaluation studies to determine the impact of this chapter. Each such evaluation shall include recommendations for improvement of the programs under this chapter. The Secretary shall, not later than July 1 of each year, submit to the appropriate committees of each House of the Congress and publish in the Federal Register proposed evaluation priorities for review and comment.

(d) Cooperative agreements with State educational agencies

(1) The Secretary may enter into cooperative agreements with State educational agencies and other State agencies to carry out studies to assess the impact and effectiveness of programs assisted under this chapter.

(2) An agreement under paragraph (1) shall—

(A) provide for the payment of not to exceed 60 percent of the total cost of studies conducted by a participating State agency to assess the impact and effectiveness of programs assisted under this chapter, and

(B) be developed in consultation with the State Advisory Panel established under this chapter, the local educational agencies, and others involved in or concerned with the education of handicapped children and youth and the provision of early intervention services to handicapped infants and toddlers.

(3) The Secretary shall provide technical assistance to participating State agencies in the implementation of the study design, analysis, and reporting procedures.

(4) In addition, the Secretary shall disseminate information from such studies to State agencies, regional resource centers, and clearinghouses established by this chapter, and, as appropriate, to others involved in, or concerned with, the education of handicapped children and youth and the provision of early intervention services to handicapped infants and toddlers.

(e) Specifically mandated studies

(1) At least one study shall be a longitudinal study of a sample of handicapped students, encompassing the full range of handicapping conditions, examining their educational progress while in special education and their occupational, educational, and independent living status after graduating from secondary school or otherwise leaving special education.

(2) At least one study shall focus on obtaining and compiling current information available, through State educational agencies and local educational agencies and other service providers, regarding State and local expenditures for educational services for handicapped stu-

dents (including special education and related services) and shall gather information needed in order to calculate a range of per pupil expenditures by handicapping condition.

(f) Annual report

(1) Not later than 120 days after the close of each fiscal year, the Secretary shall publish and disseminate an annual report on the progress being made toward the provision of a free appropriate public education to all handicapped children and youth and early intervention services for handicapped infants and toddlers. The annual report shall be transmitted to the appropriate committees of each House of Congress and published and disseminated in sufficient quantities to the education community at large and to other interested parties.

(2) The Secretary shall include in each annual report under paragraph (1)—

(A) a compilation and analysis of data gathered under subsection (b) of this section,

(B) an index and summary of each evaluation activity and results of studies conducted under subsection (c) of this section,

(C) a description of findings and determinations resulting from monitoring reviews of State implementation of this subchapter,

(D) an analysis and evaluation of the participation of handicapped children and youth in vocational education programs and services,

(E) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to ensure that handicapped children and youth receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of

instruction for handicapped children and youth in day or residential facilities, and

(F) any recommendation for change in the provisions of this chapter or any other Federal law providing support for the education of handicapped children and youth.

(3) In the annual report under paragraph (1) for fiscal year 1985 which is published in 1986 and for every third year thereafter, the Secretary shall include in the annual report—

(A) an index of all current projects funded under subchapters III through VII of this chapter, and

(B) data reported under sections 1421, 1422, 1423, 1426, 1434, 1441, and 1461 of this title.

(4) In the annual report under paragraph (1) for fiscal year 1988 which is published in 1989, the Secretary shall include special sections addressing the provision of a free appropriate public education to—

(A) handicapped infants, toddlers, children, and youth in rural areas,

(B) handicapped migrants,

(C) handicapped Indians (particularly programs operated under section 1411(f) of this title),

(D) handicapped Native Hawaiian (and other native Pacific basin) children and youth, and

(E) handicapped infants, toddlers, children, and youth with limited English proficiency.

(5) Beginning in 1986, in consultation with the National Council on Disability and the Bureau of Indian Affairs Advisory Committee for Exceptional Children, the Secretary shall include a description of the status of early intervention services for handicapped infants and toddlers from birth through age two, inclusive, and special

education and related services to handicapped children from 3 through 5 years of age (including those receiving services through Head Start, Developmental Disabilities Programs, Crippled Children's Services, Mental Health/Mental Retardation Agency, and State child-development centers and private agencies under contract with local schools).

(g) Authorization of appropriations

There are authorized to be appropriated \$3,800,000 for fiscal year 1987, \$4,000,000 for fiscal year 1988, and \$4,200,000 for fiscal year 1989 to carry out this section.

§ 1419. Pre-school grants

(a) Grants for fiscal years 1987 through 1989; amount of grants

(1) For fiscal years 1987 through 1989 (or fiscal year 1990 if the Secretary makes a grant under this paragraph for such fiscal year) the Secretary shall make a grant to any State which—

(A) has met the eligibility requirements of section 1412 of this title,

(B) has a State plan approved under section 1413 of this title, and

(C) provides special education and related services to handicapped children aged three to five, inclusive.

(2) (A) For fiscal year 1987 the amount of a grant to a State under paragraph (1) may not exceed—

(i) \$300 per handicapped child aged three to five, inclusive, who received special education and related services in such State as determined under section 1411(a) (3) of this section, or

(ii) if the amount appropriated under subsection (e) of this section exceeds the product of \$300 and

the total number of handicapped children aged three to five, inclusive, who received special education and related services as determined under section 1411(a) (3) of this title—

(I) \$300 per handicapped child aged three to five, inclusive, who received special education and related services in such State as determined under section 1411(a) (3) of this title, plus

(II) an amount equal to the portion of the appropriation available after allocating funds to all States under subclause (I) (the excess appropriation) divided by the estimated increase, from the preceding fiscal year, in the number of handicapped children aged three to five, inclusive, who will be receiving special education and related services in all States multiplied by the estimated increase in the number of such children in such State.

(B) For fiscal year 1988, funds shall be distributed in accordance with clause (i) or (ii) of paragraph (2) (A), except that the amount specified therein shall be \$400 instead of \$300.

(C) For fiscal year 1989, funds shall be distributed in accordance with clause (i) or (ii) of paragraph (2) (A), except that the amount specified therein shall be \$500 instead of \$300.

(D) If the Secretary makes a grant under paragraph (1) for fiscal year 1990, the amount of a grant to a State under such paragraph may not exceed \$1,000 per handicapped child aged three to five, inclusive, who received special education and related services in such State as determined under section 1411(a) (3) of this title.

(E) If the actual number of additional children served in a fiscal year differs from the estimate made under subparagraph (A) (ii) (II), the Secretary shall adjust

(upwards or downwards) a State's allotment in the subsequent fiscal year.

(F) (i) The amount of a grant under subparagraph (A), (B), or (C) to any State for a fiscal year may not exceed \$3,800 per estimated handicapped child aged three to five, inclusive, who will be receiving or handicapped child, age three to five, inclusive, who is receiving special education and related services in such State.

(ii) If the amount appropriated under subsection (e) of this section for any fiscal year exceeds the amount of grants which may be made to the States for such fiscal year, the excess amount appropriated shall remain available for obligation under this section for 2 succeeding fiscal years.

(3) To receive a grant under paragraph (1) a State shall make an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(b) Grants for fiscal year 1990 and thereafter; amount of grants

(1) For fiscal year 1990 (or fiscal year 1991 if required by paragraph (2)) and fiscal years thereafter the Secretary shall make a grant to any State which—

(A) has met the eligibility requirements of section 1412 of this title, and

(B) has a State plan approved under section 1413 of this title which includes policies and procedures that assure the availability under the State law and practice of such State of a free appropriate public education for all handicapped children aged three to five, inclusive.

(2) The Secretary may make a grant under paragraph (1) only for fiscal year 1990 and fiscal years thereafter, except that if—

(A) the aggregate amount that was appropriated under subsection (e) of this section for fiscal years 1987, 1988, and 1989 was less than \$656,000,000, or

(B) the amount appropriated for fiscal year 1990 under subsection (e) of this section is less than \$306,000,000,

the Secretary may not make a grant under paragraph (1) until fiscal year 1991 and shall make a grant under subsection (a) (1) of this section for fiscal year 1990.

— (3) The amount of any grant to any State under paragraph (1) for any fiscal year may not exceed \$1,000 for each handicapped child in such State aged three to five, inclusive.

(4) To receive a grant under paragraph (1) a State shall make an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(c) Distribution by State of received funds

(1) For fiscal year 1987, a State which receives a grant under subsection (a) (1) of this section shall—

(A) distribute at least 70 percent of such grant to local educational agencies and intermediate educational units in such State in accordance with paragraph (3), except that in applying such section only handicapped children aged three to five, inclusive, shall be considered,

(B) use not more than 25 percent of such grant for the planning and development of a comprehensive delivery system for which a grant could have been made under section 1423(b) of this title in effect through fiscal year 1987 and for direct and support services for handicapped children, and

(C) use not more than 5 percent of such grant for administrative expenses related to the grant.

(2) For fiscal years beginning after fiscal year 1987, a State which receives a grant under subsection (a) (1) of this section or (b) (1) of this section shall—

(A) distribute at least 75 percent of such grant to local educational agencies and intermediate educational units in such State in accordance with paragraph (3), except that in applying such section only handicapped children aged three to five, inclusive, shall be considered,

(B) use not more than 20 percent of such grant for the planning and development of a comprehensive delivery system for which a grant could have been made under section 1423(b) of this title in effect through fiscal year 1987 and for direct and support services for handicapped children, and

(C) use not more than 5 percent of such grant for administrative expenses related to the grant.

(3) From the amount of funds available to local educational agencies and intermediate educational units in any State under this section, each local educational agency or intermediate educational unit shall be entitled to—

(A) an amount which bears the same ratio to the amount available under subsection (a) (2) (A) (i) of this title or subsection (a) (2) (A) (ii) (I) of this title, as the case may be, as the number of handicapped children aged three to five, inclusive, who received special education and related services as determined under section 1411(a) (3) of this title in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to five, inclusive, who received special education and related services in all local educational agencies and intermediate educational units in the State entitled to funds under this section, and

(B) to the extent funds are available under subsection (a)(2)(A)(ii)(II) of this section, an amount which bears the same ratio to the amount of such funds as the estimated number of additional handicapped children aged three to five, inclusive, who will be receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of such children in all local educational agencies and intermediate educational units in the State entitled to funds under this section.

(d) Insufficiency of appropriated amounts; reduction of maximum amounts receivable by States

If the sums appropriated under subsection (e) of this section for any fiscal year for making payments to States under subsection (a)(1) of this section or (b)(1) are not sufficient to pay in full the maximum amounts which all States may receive under such subsection for such fiscal year, the maximum amounts which all States may receive under such subsection for such fiscal year shall be ratably reduced by first ratably reducing amounts computed under the excess appropriation provision of subsection (a)(2)(A)(ii)(II) of this section. If additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, the reduced maximum amounts shall be increased on the same basis as they were reduced.

(e) Authorization of appropriations

For grants under subsections (a)(1) of this section and (b)(1) of this section there are authorized to be appropriated such sums as may be necessary.

(f) Availability of appropriated funds

Notwithstanding any other provision of law, unless enacted in express limitation of this subsection, amounts

appropriated under this section for fiscal years 1987 and 1988 and received by a State whose allotment for the succeeding fiscal year is adjusted downwards under subsection (a)(2)(E) of this section shall remain available for obligation by such State, and by local educational agencies and intermediate educational units in such State, during the 2 fiscal years succeeding the fiscal year for which such amounts were appropriated.

§ 1420. Payments

(a) The Secretary shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this subchapter. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this subchapter after the State educational agency has approved applications of such agencies or units for payments in accordance with section 1414(b) of this title.

(b) Payments under this subchapter may be made in advance or by way of reimbursement and in such installments as the Secretary may determine necessary.

SUBCHAPTER III—CENTERS AND SERVICES TO MEET SPECIAL NEEDS OF HANDICAPPED INDIVIDUALS

§ 1421. Regional resource centers

(a) Establishment; functions

The Secretary may make grants to, or enter into contracts or cooperative agreements with, institutions of higher education, public agencies, private nonprofit organizations, State educational agencies, or combinations of such agencies or institutions (which combinations may

include one or more local educational agencies) within particular regions of the United States, to pay all or part of the cost of the establishment and operation of regional resource centers. Each regional resource center shall provide consultation, technical assistance, and training to State educational agencies and through such State educational agencies to local educational agencies and to other appropriate public agencies providing early intervention services. The services provided by a regional resource center shall be consistent with the priority needs identified by the States served by the center and the findings of the Secretary in monitoring reports prepared by the Secretary under section 1417 of this title. Each regional resource center established or operated under this section shall—

- (1) assist in identifying and solving persistent problems in providing quality special education and related services for handicapped children and youth and early intervention services to handicapped infants and toddlers and their families,

- (2) assist in developing, identifying, and replicating successful programs and practices which will improve special education and related services to handicapped children and youth and their families and early intervention services to handicapped infants and toddlers and their families,

- (3) gather and disseminate information to all State educational agencies within the region and coordinate activities with other centers assisted under this subsection and other relevant projects conducted by the Department of Education,

- (4) assist in the improvement of information dissemination to and training activities for professionals and parents of handicapped infants, toddlers, children, and youth, and

(5) provide information to and training for agencies, institutions, and organizations, regarding techniques and approaches for submitting applications for grants, contracts, and cooperative agreements under this subchapter and subchapters IV through VII.

(b) Considerations governing approval of application

In determining whether to approve an application for a project under subsection (a) of this section, the Secretary shall consider the need for such a center in the region to be served by the applicant and the capability of the applicant to fulfill the responsibilities under subsection (a) of this section.

(c) Annual report; summary of information

Each regional resource center shall report a summary of materials produced or developed and the summaries reported shall be included in the annual report to Congress required under section 1418 of this title.

(d) Coordination technical assistance center; establishment; duties

The Secretary may establish one coordinating technical assistance center focusing on national priorities established by the Secretary to assist the regional resource centers in the delivery of technical assistance, consistent with such national priorities.

(e) Amounts available for coordination technical assistance center

Before using funds made available in any fiscal year to carry out this section for purposes of subsection (d) of this section, not less than the amount made available in the previous fiscal year for regional resource centers under subsection (a) of this section shall be made avail-

able for such centers and in no case shall more than \$500,000 be made available for the center under subsection (d) of this section.

§ 1422. Services for deaf-blind children and youth

(a) Grant and contract authority; types and scope of programs; governing considerations

(1) The Secretary is authorized to make grants to, or to enter into cooperative agreements or contracts with, public or nonprofit private agencies, institutions, or organizations to assist State educational agencies to—

(A) assure deaf-blind children and youth provision of special education and related services as well as vocational and transitional services; and

(B) make available to deaf-blind youth, upon attaining the age of twenty-two, programs and services to facilitate their transition from educational to other services.

(2) A grant, cooperative agreement, or contract pursuant to paragraph (1) (A) may be made only for programs providing (A) technical assistance to agencies, institutions, or organizations providing educational services to deaf-blind children or youth; (B) preservice or inservice training to paraprofessionals, professionals, or related services personnel preparing to serve, or serving, deaf-blind children or youth; (C) replication of successful innovative approaches to providing educational or related services to deaf-blind children and youth; and (D) facilitation of parental involvement in the education of their deaf-blind children and youth. Such programs may include—

(i) the diagnosis and educational evaluation of children and youth at risk of being certified deaf-blind;

(ii) programs of adjustment, education, and orientation for deaf-blind children and youth; and

(iii) consultative, counseling, and training services for the families of deaf-blind children and youth.

(3) A grant, cooperative agreement, or contract pursuant to paragraph (1) (B) may be made only for programs providing (A) technical assistance to agencies, institutions, and organizations serving, or proposing to serve, deaf-blind individuals who have attained age twenty-two years; (B) training or inservice training to paraprofessionals or professionals serving, or preparing to serve, such individuals; and (C) assistance in the development or replication of successful innovative approaches to providing rehabilitative, semi-supervised, or independent living programs.

(4) In carrying out this subsection, the Secretary shall take into consideration the need for a center for deaf-blind children and youth in light of the general availability and quality of existing services for such children and youth in the part of the country involved.

(b) Contract authority for regional programs of technical assistance

The Secretary is also authorized to enter into a limited number of cooperative agreements or contracts to establish and support regional programs for the provision of technical assistance in the education of deaf-blind children and youth.

(c) Annual report to Secretary; examination of numbers and services and revision of numbers; annual report to Congress; summary of data

(1) Programs supported under this section shall report annually to the Secretary on (A) the numbers of deaf-blind children and youth served by age, severity, and

nature of deaf-blindness; (B) the number of paraprofessionals, professionals, and family members directly served by each activity; and (C) the types of services provided.

(2) The Secretary shall examine the number of deaf-blind children and youth (A) reported under subparagraph (c) (1) (A) and by the States; (B) served by the programs under subchapter II of this chapter and subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2791 et seq.]; and (C) the Deaf-Blind Registry of each State. The Secretary shall revise the count of deaf-blind children and youth to reflect the most accurate count.

(3) The Secretary shall summarize these data for submission in the annual report required under section 1418 of this title.

(d) Dissemination of materials and information concerning working practices

The Secretary shall disseminate materials and information concerning effective practices in working with deaf-blind children and youth.

(e) Extended school year demonstration programs

The Secretary is authorized to make grants to, or enter into contracts or cooperative agreements with, public or nonprofit private agencies, institutions, or organizations for the development and operation of extended school year demonstration programs for severely handicapped children and youth, including deaf-blind children and youth.

(f) Grants for purposes under other parts of this chapter

The Secretary may make grants to, or enter into contracts or cooperative agreements with, the entities under

section 1424(a) of this title for the purposes in such section.

§ 1423. Experimental, demonstration, and outreach preschool and intervention programs for handicapped children

- (a) Contracts, grants and cooperative agreements; purpose; community coordination programs; national dispersion in urban and rural areas; Federal share; non-Federal contributions; arrangements with Indian tribes

(1) The Secretary may arrange by contract, grant, or cooperative agreement with appropriate public agencies and private nonprofit organizations, for the development and operation of experimental, demonstration, and outreach preschool and early intervention programs for handicapped children which the Secretary determines show promise of promoting a comprehensive and strengthened approach to the special problems of such children. Such programs shall include activities and services designed to—

(A) facilitate the intellectual, emotional, physical, mental, social, speech, language development, and self-help skills of such children,

(B) encourage the participation of the parents of such children in the development and operation of any such program,

(C) acquaint the community to be served by any such program with the problems and potentialities of such children,

(D) offer training about exemplary models and practices to State and local personnel who provide services to handicapped children from birth through age 8, and

(E) support the adoption of exemplary models and practices in States and local communities.

(2) Programs authorized by paragraph (1) shall be coordinated with similar programs in the schools operated or supported by State or local educational agencies of the community to be served and with similar programs operated by other public agencies in such community.

(3) As much as is feasible, programs assisted under paragraph (1) shall be geographically dispersed throughout the Nation in urban as well as rural areas.

(4) (A) Except as provided in subparagraph (B), no arrangement under paragraph (1) shall provide for the payment of more than 90 percent of the total annual costs of development, operation, and evaluation of any program. Non-Federal contributions may be in cash or in kind, fairly evaluated, including plant, equipment, and services.

(B) The Secretary may waive the requirement of subparagraph (A) in the case of an arrangement entered into under paragraph (1) with governing bodies of Indian tribes located on Federal or State reservations and with consortia of such bodies.

(b) Technical assistance development program

The Secretary shall arrange by contract, grant, or cooperative agreement with appropriate public agencies and private nonprofit organizations for the establishment of a technical assistance development system to assist entities operating experimental, demonstration, and outreach programs and to assist State agencies to expand and improve services provided to handicapped children.

(c) Early childhood research institutes

The Secretary shall arrange by contract, grant, or cooperative agreement with appropriate public agencies and

private nonprofit organizations for the establishment of early childhood research institutes to carry on sustained research to generate and disseminate new information on preschool and early intervention for handicapped children and their families.

- (d) Grants or contracts with organizations to identify needs of handicapped children and for training of personnel

The Secretary may make grants to, or enter into contracts or cooperative agreements under this section with, such organizations or institutions, as are determined by the Secretary to be appropriate, for research to identify and meet the full range of special needs of handicapped children and for training of personnel for programs specifically designed for handicapped children.

- (e) Notice in Federal Register of intent to accept applications for grants, contracts, etc.

At least one year before the termination of a grant, contract, or cooperative agreement made or entered into under subsections (b) and (c) of this section, the Secretary shall publish in the Federal Register a notice of intent to accept application for such a grant, contract, or cooperative agreement contingent on the appropriation of sufficient funds by Congress.

- (f) "Handicapped children" defined

For purposes of this section the term "handicapped children" includes children from birth through eight years of age.

§ 1424. Research, innovation, training, and dissemination activities in connection with model centers and services for handicapped

- (a) Grant and contract authority

The Secretary may make grants to, or enter into contracts or cooperative agreements with, such organizations

or institutions, as are determined by the Secretary to be appropriate, to address the needs of severely handicapped children and youth, for—

(1) research to identify and meet the full range of special needs of such handicapped children and youth,

(2) the development or demonstration of new, or improvements in existing, methods, approaches, or techniques which would contribute to the adjustment and education of such handicapped children and youth,

(3) training of personnel for programs specifically designed for such children, and youth and

(4) dissemination of materials and information about practices found effective in working with such children and youth.

(b) Coordination of activities with similar activities under other parts of this chapter

In making grants and entering into contracts and cooperative agreements under subsection (a) of this section, the Secretary shall ensure that the activities funded under such grants, contracts, or cooperative agreements will be coordinated with similar activities funded from grants and contracts under other sections of this chapter.

(c) National geographic dispersion of programs in urban and rural areas

To the extent feasible, programs authorized by subsection (a) of this section shall be geographically dispersed throughout the Nation in urban and rural areas.

§ 1424a. Postsecondary and other specially designed model programs

(a) Grant and contract authority; development, operation, and dissemination of postsecondary, vocational, technical, continuing, or adult education programs;

priority of programs; notice in Federal Register of intent to accept application for grant or contract; national geographic dispersion in urban and rural areas; availability of sums for regional centers

(1) The Secretary may make grants to, or enter into contracts with, State educational agencies, institutions of higher education, junior and community colleges, vocational and technical institutions, and other appropriate nonprofit educational agencies for the development, operation, and dissemination of specially designed model programs of postsecondary, vocational, technical, continuing, or adult education for handicapped individuals.

(2) In making grants or contracts on a competitive basis under paragraph (1), the Secretary shall give priority consideration to 4 regional centers for the deaf and to model programs for individuals with handicapping conditions other than deafness—

(A) for developing and adapting programs of postsecondary, vocational, technical, continuing, or adult education to meet the special needs of handicapped individuals, and

(B) for programs that coordinate, facilitate, and encourage education of handicapped individuals with their nonhandicapped peers.

(3) Persons operating programs for handicapped persons under a grant or contract under paragraph (1) must coordinate their efforts with and disseminate information about their activities to the clearinghouse on postsecondary programs established under section 1433(b) of this title.

(4) At least one year before the termination of a grant or contract with any of the 4 regional centers for the deaf, the Secretary shall publish in the Federal Register a notice of intent to accept applications for such grant or contract, contingent on the appropriation of sufficient funds by Congress.

(5) To the extent feasible, programs authorized by paragraph (1) shall be geographically dispersed throughout the Nation in urban and rural areas.

(6) Of the sums made available for programs under paragraph (1), not less than \$2,000,000 shall first be available for the 4 regional centers for the deaf.

(b) "Handicapped individuals" defined

For the purposes of subsection (a) of this section the term "handicapped individuals" means individuals who are mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired individuals, or individuals with specific learning disabilities who by reason thereof require special education and related services.

§ 1425. Secondary education and transitional services for handicapped youth

(a) Grant and contract authority; statement of purposes; national geographic dispersion in urban and rural areas

The Secretary may make grants to, or enter into contracts with, institutions of higher education, State educational agencies, local educational agencies, or other appropriate public and private nonprofit institutions or agencies (including the State job training coordinating councils and service delivery area administrative entities established under the Job Training Partnership Act [29 U.S.C.A. § 1501 et seq.]) to—

(1) strengthen and coordinate special education and related services for handicapped youth currently in school or who recently left school to assist them in the transition to postsecondary education, vocational training, competitive employment (including

supported employment), continuing education, or adult services,

(2) stimulate the improvement and development of programs for secondary special education, and

(3) stimulate the improvement of the vocational and life skills of handicapped students to enable them to be better prepared for transition to adult life and services.

To the extent feasible, such programs shall be geographically dispersed throughout the Nation in urban and rural areas.

(b) Description of specific projects

Projects assisted under subsection (a) of this section may include—

(1) developing strategies and techniques for transition to independent living, vocational training, vocational rehabilitation, postsecondary education, and competitive employment (including supported employment) for handicapped youth,

(2) establishing demonstration models for services, programs, and individualized education programs, which emphasize vocational training, transitional services, and placement for handicapped youth,

(3) conducting demographic studies which provide information on the numbers, age levels, types of handicapping conditions, and services required for handicapped youth in need of transitional programs,

(4) specially designed vocational programs to increase the potential for competitive employment for handicapped youth,

(5) research and development projects for exemplary service delivery models and the replication and dissemination of successful models,

(6) initiating cooperative models among educational agencies and adult service agencies, including vocational rehabilitation, mental health, mental retardation, and public employment, and employers, which facilitate the planning and developing of transitional services for handicapped youth to postsecondary education, vocational training, employment, continuing education, and adult services,

(7) developing appropriate procedures for evaluating vocational training, placement, and transitional services for handicapped youth,

(8) conducting studies which provide information on the numbers, age levels, types of handicapping conditions and reasons why handicapped youth drop out of school,

(9) developing special education curriculum and instructional techniques that will improve handicapped students' acquisition of the skills necessary for transition to adult life and services, and

(10) specially designed physical education and therapeutic recreation program to increase the potential of handicapped youths for community participation.

(c) Coordination of non-educational-agency applicant with State educational agency

For purposes of paragraphs (1) and (2) of subsection (b) of this section, if an applicant is not an educational agency, such applicant shall coordinate its activities with the State educational agency.

(d) Applications for assistance; contents

Applications for assistance under subsection (a) of this section other than for the purpose of conducting studies or evaluations shall—

(1) describe the procedures to be used for disseminating relevant findings and data to regional resource centers, clearinghouses, and other interested persons, agencies, or organizations,

(2) describe the procedures that will be used for coordinating services among agencies for which handicapped youth are or will be eligible, and

(3) to the extent appropriate, provide for the direct participation of handicapped students and the parents of handicapped students in the planning, development, and implementation of such projects.

- (e) Development or demonstration of new or improvement in methods, approaches, or techniques

The Secretary is authorized to make grants to, or to enter into contracts or cooperative agreements with, such organizations or institutions as are determined by the Secretary to be appropriate for the development or demonstration of new or improvements in existing methods, approaches, or techniques which will contribute to the adjustment and education of handicapped children and youth and the dissemination of materials and information concerning practices found effective in working with such children and youth.

- (f) Coordination of educational programs with vocational rehabilitation projects

The Secretary, as appropriate, shall coordinate programs described under subsection (a) of this section with projects developed under section 777a of Title 29.

§ 1426. Program evaluations; submittal of analyses to Congressional committees

The Secretary shall conduct, either directly or by contract, a thorough and continuing evaluation of the effec-

tiveness of each program assisted under this subchapter. Results of the evaluations shall be analyzed and submitted to the appropriate committees of each House of Congress together with the annual report under section 1418 of this title.

§ 1427. Authorization of appropriations

(a) There are authorized to be appropriated to carry out section 1421 of this title, \$6,700,000 for fiscal year 1987, \$7,100,000 for fiscal year 1988, and \$7,500,000 for fiscal year 1989.

(b) There are authorized to be appropriated to carry out section 1422 of this title, \$15,900,000 for fiscal year 1987, \$16,800,000 for fiscal year 1988, and \$17,800,000 for fiscal year 1989.

(c) There are authorized to be appropriated to carry out section 1423 of this title, \$24,470,000 for fiscal year 1987, \$25,870,000 for fiscal year 1988, and \$27,410,000 for fiscal year 1989.

(d) There are authorized to be appropriated to carry out section 1424 of this title, \$5,300,000 for fiscal year 1987, \$5,600,000 for fiscal year 1988, and \$5,900,000 for fiscal year 1989.

(e) There are authorized to be appropriated to carry out section 1424a of this title, \$5,900,000 for fiscal year 1987, \$6,200,000 for fiscal year 1988, and \$6,600,000 for fiscal year 1989.

(f) There are authorized to be appropriated to carry out section 1425 of this title, \$7,300,000 for fiscal year 1987, \$7,700,000 for fiscal year 1988, and \$8,100,000 for fiscal year 1989.

SUBCHAPTER IV—
TRAINING PERSONNEL FOR THE EDUCATION
OF HANDICAPPED INDIVIDUALS

§ 1431. Grants for personnel training

- (a) Careers in special education; personnel standards; training-study and fellowships-traineeships costs; contract authority for areas of personnel shortages

(1) The Secretary may make grants, which may include scholarships with necessary stipends and allowances, to institutions of higher education (including university affiliated programs and satellite centers participating in programs under part D of the Developmental Disabilities Assistance and Bill of Rights Act) and other appropriate nonprofit agencies to assist them in training personnel for careers in special education and early intervention, including—

(A) special education teaching, including speech-language pathology and audiology, and adaptive physical education,

(B) related services to handicapped children and youth in educational settings,

(C) special education supervision and administration,

(D) special education research, and

(E) training of special education personnel and other personnel providing special services and pre-school and early intervention services for handicapped children.

(2) (A) The Secretary shall base the award of grants under paragraph (1) on information relating to the present and projected need for the personnel to be trained based on identified State, regional, or national shortages, and the capacity of the institution or agency to train

qualified personnel, and other information considered appropriate by the Secretary.

(B) The Secretary shall ensure that grants are only made under paragraph (1) to applicant agencies and institutions that meet State and professionally recognized standards for the preparation of special education and related services personnel unless the grant is for the purpose of assisting the applicant agency or institution to meet such standards.

(3) Grants under paragraph (1) may be used by institutions to assist in covering the cost of courses of training or study for such personnel and for establishing and maintaining fellowships or traineeships with such stipends and allowances as may be determined by the Secretary.

(4) The Secretary in carrying out paragraph (1) may reserve a sum not to exceed 5 percent of the amount available for paragraph (1) in each fiscal year for contracts to prepare personnel in areas where shortages exist when a response to that need has not been adequately addressed by the grant process.

(b) Special projects for preservice training, regular educators, and inservice training of special education personnel

The Secretary may make grants to institutions of higher education, State agencies, and other appropriate nonprofit agencies to conduct special projects to develop and demonstrate new approaches (including the application of new technology) for the preservice training purposes set forth in subsection (a) of this section for regular educators, for the training of teachers to work in community and school settings with handicapped secondary school students, and for the inservice training of special education personnel, including classroom aides, related services personnel, and regular education personnel who serve handicapped children and personnel providing early intervention services.

(c) Parent training and information programs

(1) The Secretary may make grants through a separate competition to private nonprofit organizations for the purpose of providing training and information to parents of handicapped children and persons who work with parents to enable such individuals to participate more effectively with professionals in meeting the educational needs of handicapped children. Such grants shall be designed to meet the unique training and information needs of parents of handicapped children living in the area to be served by the grant, particularly those who are members of groups that have been traditionally under-represented.

(2) In order to receive a grant under paragraph (1) a private nonprofit organization shall—

(A) be governed by a board of directors of which a majority of the members are parents of handicapped children and which includes members who are professionals in the field of special education and related services who serve handicapped children and youth, or if the nonprofit private organization does not have such a board, such organization shall have a membership which represents the interests of individuals with handicapping conditions, and shall establish a special governing committee of which a majority of the members are parents of handicapped children and which includes members who are professionals in the fields of special education and related services, to operate the training and information program under paragraph (1);

(B) serve the parents of children with the full range of handicapping conditions under such grant program, and

(C) demonstrate the capacity and expertise to conduct effectively the training and information activities for which a grant may be made under paragraph (1).

(3) The board of directors or special governing committee of a private nonprofit organization receiving a grant under paragraph (1) shall meet at least once in each calendar quarter to review the parent training and information activities for which the grant is made, and each such committee shall advise the governing board directly of its views and recommendations. Whenever a private nonprofit organization requests the renewal of a grant under paragraph (1) for a fiscal year, the board of directors or the special governing committee shall submit to the Secretary a written review of the parent training and information program conducted by that private nonprofit organization during the preceding fiscal year.

(4) The Secretary shall ensure that grants under paragraph (1) will—

(A) be distributed geographically to the greatest extent possible throughout all the States and give priority to grants which involve unserved areas, and

(B) be targeted to parents of handicapped children in both urban and rural areas or on a State or regional basis.

(5) Parent training and information programs assisted under paragraph (1) shall assist parents to—

(A) better understand the nature and needs of the handicapping conditions of children,

(B) provide followup support for handicapped children's educational programs,

(C) communicate more effectively with special and regular educators, administrators, related services personnel, and other relevant professionals,

(D) participate in educational decisionmaking processes including the development of a handicapped child's individualized education program,

(E) obtain information about the programs, services, and resources available to handicapped children

and the degree to which the programs, services, and resources are appropriate, and

(F) understand the provisions for the education of handicapped children as specified under subchapter II of this chapter.

(6) Parent training and information programs may, at a grant recipients discretion, include State or local educational personnel where such participation will further an objective of the program assisted by the grant.

(7) Each private nonprofit organization operating a program receiving a grant under paragraph (1) shall consult with appropriate agencies which serve or assist handicapped children and youth and are located in the jurisdictions served by the program.

(8) The Secretary shall provide technical assistance, by grant or contract, for establishing, developing, and coordinating parent training and information programs.

§ 1432. Grants to State educational agencies and institutions for traineeships

(a) Size and scope of grant

(a) The Secretary shall make a grant of sufficient size and scope to each State educational agency for the purposes described in subsection (c), of this section and, in any State in which the State educational agency does not apply for such a grant, to an institution of higher education within such State for such purposes.

(b) Grants on competitive basis

The Secretary may also make a limited number of grants to State educational agencies on a competitive basis for the purposes described in subsection (c) of this section. In any fiscal year, the Secretary may not expend for purposes of this subsection an amount that exceeds

10 percent of the amount expended for purposes of this section in the preceding fiscal year.

(c) Purpose of grants

Grants made under this section shall be for the purpose of assisting States in establishing and maintaining pre-service and inservice programs to prepare personnel to met the needs of handicapped infants, toddlers, children, and youth or supervisors of such persons, consistent with the personnel needs identified in the State's comprehensive system of personnel development under section 1413 of this title and under section 1476(b)(8) of this title.

§ 1433. Clearinghouses

- (a) National clearinghouse on education of handicapped; establishment; other support projects; statement of objectives

The Secretary is authorized to make a grant to or enter into a contract with a public agency or a nonprofit private organization or institution for a national clearinghouse on the education of the handicapped and to make grants or contracts with a public agency or a nonprofit private organization or institution for other support projects which may be deemed necessary by the Secretary to disseminate information and provide technical assistance on a national basis to parents, professionals, and other interested parties concerning—

(1) programs relating to the education of the handicapped under this chapter and under other Federal laws, and

(2) participation in such programs, including referral of individuals to appropriate national, State, and local agencies and organizations for further assistance.

- (b) National clearinghouse on postsecondary education for handicapped; establishment; statement of purpose

In addition to the clearinghouse established under subsection (a) of this section, the Secretary shall make a grant or enter into a contract for a national clearinghouse on postsecondary education for handicapped individuals for the purpose of providing information on available services and programs in postsecondary education for the handicapped.

- (c) National clearinghouse to encourage careers and employment in fields relating to education of the handicapped

The Secretary shall make a grant or enter into a contract for a national clearinghouse designed to encourage students to seek careers and professional personnel to seek employment in the various fields relating to the education of handicapped children and youth through the following:

(1) Collection and dissemination of information on current and future national, regional, and State needs for special education and related services personnel.

(2) Dissemination of information to high school counselors and others concerning current career opportunities in special education, location of programs, and various forms of financial assistance (such as scholarships, stipends, and allowances).

(3) Identification of training programs available around the country.

(4) Establishment of a network among local and State educational agencies and institutions of higher education concerning the supply of graduates and available openings.

(5) Technical assistance to institutions seeking to meet State and professionally recognized standards.

(d) Considerations governing awards; limitation of contracts with profitmaking organizations

(1) In awarding the grants and contracts under this section, the Secretary shall give particular attention to any demonstrated experience at the national level relevant to performance of the functions established in this section, and ability to conduct such projects, communicate with the intended consumers of information, and maintain the necessary communication with other agencies and organizations.

(2) The Secretary is authorized to make contracts with profit-making organizations under this section only when necessary for materials or media access.

§ 1434. Reports to the Secretary

(a) Not more than sixty days after the end of any fiscal year, each recipient of a grant or contract under this part during such fiscal year shall prepare and submit a report to the Secretary. Each such report shall be in such form and detail as the Secretary determines to be appropriate, and shall include—

(1) the number of individuals trained under the grant or contract, by category of training and level of training; and

(2) the number of individuals trained under the grant or contract receiving degrees and certification, by category and level of training.

(b) A summary of the data required by this section shall be included in the annual report of the Secretary under section 1418 of this title.

§ 1435. Authorization of appropriations

(a) Subchapter IV, personnel recruitment, and opportunities for handicapped programs

There are authorized to be appropriated to carry out this subchapter (other than section 1433 of this title) \$70,400,000 for fiscal year 1987, \$74,500,000 for fiscal year 1988, and \$79,000,000 for fiscal year 1989. There are authorized to be appropriated to carry out section 1433 of this title, \$1,200,000 for fiscal year 1987, \$1,900,000 for fiscal year 1988, and \$2,000,000 for fiscal year 1989.

(b) Personnel training for careers in special education and early intervention

Of the funds appropriated pursuant to subsection (a) of this section for any fiscal year, the Secretary shall reserve not less than 65 per centum for activities described in subparagraphs (A) through (E) of section 1431(a)(1) of this section.

(c) Parent training and information programs.

Of the funds appropriated under subsection (a) of this section for any fiscal year, the Secretary shall reserve 10 percent for activities under section 1431(c) of this title.

§ 1436. Omitted

SUBCHAPTER V—RESEARCH IN THE EDUCATION OF HANDICAPPED INDIVIDUALS

§ 1441. Research and demonstration projects in education of handicapped children

(a) Grant and contract authority; statement of objectives; description of specific activities

The Secretary may make grants to, or enter into contracts or cooperative agreements with, State and local educational agencies, institutions of higher education, and other public agencies and nonprofit private organizations for research and related activities to assist special education personnel, related services personnel, early in-

tervention personnel, and other appropriate persons, including parents, in improving the special education and related services and early intervention services for handicapped infants, toddlers, children, and youth, and to conduct research, surveys, or demonstrations relating to the provision of services to handicapped infants, toddlers, children, and youth. Research and related activities shall be designed to increase knowledge and understanding of handicapped conditions, and teaching, learning, and education-related development practices and services for handicapped infants, toddlers, children, and youth. Research and related activities assisted under this section shall include the following:

- (1) The development of new and improved techniques and devices for teaching handicapped infants, toddlers, children, and youth.

- (2) The development of curricula which meet the unique educational and developmental needs of handicapped infants, toddlers, children, and youth.

- (3) The application of new technologies and knowledge for the purpose of improving the instruction of handicapped infants, toddlers, children, and youth.

- (4) The development of program models and exemplary practices in areas of special education and early intervention.

- (5) The dissemination of information on research and related activities conducted under this subchapter to regional resource centers and interested individuals and organizations.

- (6) The development of instruments, including tests, inventories, and scales, for measuring progress of handicapped infants, toddlers, children, and youth across a number of developmental domains.

(b) Qualifications of applicant

In carrying out subsection (a) of this section, the Secretary shall consider the special education or early

intervention experience of applicants under such subsection.

(c) Publication of research priorities in Federal Register

The Secretary shall publish proposed research priorities in the Federal Register every 2 years, not later than July 1, and shall allow a period of 60 days for public comments and suggestions. After analyzing and considering the public comments, the Secretary shall publish final research priorities in the Federal Register not later than 30 days after the close of the comment period.

(d) Reports of research projects; index of research projects for annual report; availability to interested parties

The Secretary shall provide an index (including the title of each research project and the name and address of the researching organization) of all research projects conducted in the prior fiscal year in the annual report described under section 1418 of this title. The Secretary shall make reports of research projects available to the education community at large and to other interested parties.

(e) Coordination of related research priorities; information respecting research priorities to Federal entities

The Secretary shall coordinate the research priorities established under subsection (c) of this section with research priorities established by the National Institute on Disability and Rehabilitation Research and shall provide information concerning research priorities established under such subsection to the National Council on Disability and to the Bureau of Indian Affairs Advisory Committee for Exceptional Children.

§ 1442. Research and demonstration projects in physical education and recreation for handicapped children

The Secretary is authorized to make grants to States, State or local educational agencies, institutions of higher education, and other public or nonprofit private educational or research agencies and organizations, and to make contracts with States, State or local educational agencies, institutions of higher education, and other public or private educational or research agencies and organizations, for research and related purposes relating to physical education or recreation for handicapped children, and to conduct research, surveys, or demonstrations relating to physical education or recreation for handicapped children.

§ 1443. Panels of experts

(a) Convention; composition

The Secretary shall convene, in accordance with subsection (b) of this section, panels of experts who are competent to evaluate proposals for projects under subchapters III through VII of this chapter. The panels shall be composed of—

(1) individuals from the field of special education for handicapped individuals and other relevant disciplines who have significant expertise and experience in the content areas and age levels addressed in the proposals, and

(2) handicapped individuals and parents of handicapped individuals when appropriate.

(b) Funding requests for which panel required to be convened; membership; expenses and fees

(1) The Secretary shall convene panels under subsection (a) of this section for any application which in-

cludes a total funding request exceeding \$60,000 and may convene or otherwise appoint panels for applications which include funding requests that are less than such amount.

(2) Such panels shall include a majority of non-Federal members. Such non-Federal members shall be provided travel and per diem not to exceed the rate provided to other educational consultants used by the Department and shall be provided consultant fees at such a rate.

(c) Use of funds available under other parts of this chapter for payment of expenses and fees

The Secretary may use funds available under subchapters III to VII of this chapter to pay expenses and fees of non-Federal members under subsection (b) of this section.

§ 1444. Authorization of appropriations

For purposes of carrying out this subchapter, there are authorized to be appropriated \$18,000,000 for fiscal year 1987, \$19,000,000 for fiscal year 1988, and \$20,100,000 for fiscal year 1989.

SUBCHAPTER VI—INSTRUCTIONAL MEDIA FOR HANDICAPPED INDIVIDUALS

§ 1451. Congressional statement of purposes

The purposes of this part are to promote—

(1) the general welfare of deaf individuals by—

(A) bringing to such individuals understanding and appreciation of those films that play such an important part in the general and cultural advancement of hearing individuals;

(B) providing through these films enriched educational and cultural experiences through

which deaf individuals can be brought into better touch with the realities of their environment; and

(C) providing a wholesome and rewarding experience that deaf individuals may share together; and

(2) the educational advancement of handicapped individuals by—

(A) carrying on research in the use of educational media for handicapped individuals;

(B) producing and distributing educational media for the use of handicapped individuals, their parents, their actual or potential employers, and other individuals directly involved in work for the advancement of handicapped individuals; and

(C) training individuals in the use of educational media for the instruction of handicapped individuals.

§ 1452. Captioned films and educational media for handicapped individuals

(a) Establishment of loan service

The Secretary shall establish a loan service of captioned films and educational media for the purpose of making such materials available, in accordance with regulations, in the United States for nonprofit purposes to handicapped individuals, parents of handicapped individuals, and other individuals directly involved in activities for the advancement of handicapped individuals, including for the purpose of addressing problems of illiteracy among the handicapped.

(b) Authority of Secretary

The Secretary is authorized to—

(1) acquire films (or rights thereto) and other educational media by purchase, lease, or gift;

(2) acquire by lease or purchase equipment necessary for the administration of this subchapter;

(3) provide, by grant or contract, for the captioning of films;

(4) provide, by grant or contract, for the distribution of captioned films and other educational media and equipment through State schools for handicapped individuals, public libraries, and such other agencies as the Secretary may deem appropriate to serve as local or regional centers for such distribution;

(5) provide, by grant or contract, for the conduct of research in the use of educational and training films and other educational media for handicapped individuals, for the production and distribution of educational and training films and other educational media for handicapped individuals and the training of individuals in the use of such films and media, including the payment to those individuals of such stipends (including allowances for travel and other expenses of such individuals and their dependents) as the Secretary may determine, which shall be consistent with prevailing practices under comparable federally supported programs;

(6) utilize the facilities and services of other governmental agencies;

(7) accept gifts, contributions, and voluntary and uncompensated services of individuals and organizations, and

(8) provide by grant or contract for educational media and materials for deaf individuals.

(c) Cooperative agreements with National Theatre of the Deaf, Inc.

The Secretary may make grants to or enter into contracts or cooperative agreements with the National Theater of the Deaf, Inc. for the purpose of providing theatrical experiences to—

- (1) enrich the lives of deaf children and adults,
- (2) increase public awareness and understanding of deafness and of the artistic and intellectual achievements of deaf individuals, and
- (3) promote the integration of hearing and deaf individuals through shared cultural experiences.

§ 1453. Repealed. Pub.L. 99-457, Title III, § 316, Oct. 8, 1986, 100 Stat. 1171

§ 1454. Authorization of appropriations

For the purposes of carrying out this subchapter, there are authorized to be appropriated \$15,000,000 for fiscal year 1987, \$15,750,000 for fiscal year 1988, and \$16,540,000 for fiscal year 1989.

SUBCHAPTER VII—TECHNOLOGY, EDUCATIONAL MEDIA, AND MATERIALS FOR THE HANDICAPPED INDIVIDUALS

§ 1461. Authority of Secretary; purpose of projects or centers

The Secretary may make grants or enter into contracts or cooperative agreements with institutions of higher education, State and local educational agencies, or other appropriate agencies and organizations for the purpose of advancing the use of new technology, media, and materials in the education of handicapped students and the provision of early intervention to handicapped in-

phants and toddlers. In carrying out this section, the Secretary may fund projects or centers for the purposes of—

(1) determining how technology, media, and materials are being used in the education of handicapped individuals and how they can be used more effectively,

(2) designing and adapting new technology, media, and materials to improve the education of handicapped students,

(3) assisting the public and private sectors in the development and marketing of new technology, media, and materials for the education of handicapped individuals, and

(4) disseminating information on the availability and use of new technology, media, and materials for the education of handicapped individuals.

§ 1462. Authorization of appropriations

For the purposes of carrying out this subchapter, there are authorized to be appropriated \$10,000,000 for fiscal year 1987, \$10,500,000 for fiscal year 1988, and \$11,025,000 for fiscal year 1989.

SUBCHAPTER VIII—HANDICAPPED INFANTS AND TODDLERS

§ 1471. Findings and policy

(a) Findings

The Congress finds that there is an urgent and substantial need—

(1) to enhance the development of handicapped infants and toddlers and to minimize their potential for developmental delay,

(2) to reduce the educational costs to our society, including our Nation's schools, by minimizing the need for special education and related services after handicapped infants and toddlers reach school age,

(3) to minimize the likelihood of institutionalization of handicapped individuals and maximize the potential for their independent living in society, and

(4) to enhance the capacity of families to meet the special needs of their handicapped infants and toddlers.

(b) Policy

It is therefore the policy of the United States to provide financial assistance to States—

(1) to develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency program of early intervention services for handicapped infants and toddlers and their families,

(2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage), and

(3) to enhance their capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to handicapped infants, toddlers, and their families.

§ 1472. Definitions

As used in this subchapter—

(1) The term “handicapped infants and toddlers” means individuals from birth to age 2, inclusive, who need early intervention services because they—

(A) are experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: cognitive development, physical development, language and speech development, psychosocial development, or self-help skills, or

(B) have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay.

Such term may also include, at a State's discretion, individuals from birth to age 2, inclusive, who are at risk of having substantial developmental delays if early intervention services are not provided.

(2) The term "early intervention services" are developmental services which—

(A) are provided under public supervision,

(B) are provided at no cost except where Federal or State law provides for a system of payments by families, including a schedule of sliding fees,

(C) are designed to meet a handicapped infant's or toddler's developmental needs in any one or more of the following areas:

(i) physical development,

(ii) cognitive development,

(iii) language and speech development,

(iv) psycho social development, or

(v) self-help skills,

(D) meet the standards of the State, including the requirements of this part,

(E) include—

(i) family training, counseling, and home visits,

(ii) special instruction,

(iii) speech pathology and audiology,

(iv) occupational therapy,

- (v) physical therapy,
- (vi) psychological services,
- (vii) case management services,
- (viii) medical services only for diagnostic or evaluation purposes,
- (ix) early identification, screening, and assessment services, and
- (x) health services necessary to enable the infant or toddler to benefit from the other early intervention services,

(F) are provided by qualified personnel, including—

- (i) special educators,
- (ii) speech and language pathologists and audiologists,
- (iii) occupational therapists,
- (iv) physical therapists,
- (v) psychologists,
- (vi) social workers,
- (vii) nurses, and
- (viii) nutritionists, and

(G) are provided in conformity with an individualized family service plan adopted in accordance with section 1477 of this title.

(3) The term “developmental delay” has the meaning given such term by a State under section 1476(b)(1) of this title.

(4) The term “council” means the State Inter-agency Coordinating Council established under section 1482 of this title.

§ 1473. General authority

The Secretary shall, in accordance with this subchapter, make grants to States (from their allocations under section 1484 of this Title) to assist each State to develop a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide early intervention services for handicapped infants and toddlers and their families.

§ 1474. General eligibility

In order to be eligible for a grant under section 1473 of this title for any fiscal year, a State shall demonstrate to the Secretary (in its application under section 1478 of this title) that the State has established a State Interagency Coordinating Council which meets the requirements of section 1482 of this title.

§ 1475. Continuing eligibility

(a) First two years

In order to be eligible for a grant under section 1473 of this title for the first or second year of a State's participation under this subchapter, a State shall include in its application under section 1478 of this title for that year an assurance that funds received under section 1473 of this title shall be used to assist the State to plan, develop, and implement the statewide system required by section 1476 of this title.

(b) Third and fourth year

(1) In order to be eligible for a grant under section 1473 of this title for the third or fourth year of a State's participation under this subchapter, a State shall include in its application under section 1478 of this title for that year information and assurances demonstrating to the satisfaction of the Secretary that—

(A) the State has adopted a policy which incorporates all of the components of a statewide system

in accordance with section 1476 of this title or obtained a waiver from the Secretary under paragraph (2),

(B) funds shall be used to plan, develop, and implement the statewide system required by section 1476 of this title, and

(C) such statewide system will be in effect no later than the beginning of the fourth year of the State's participation under section 1473 of this title, except that in order to comply with section 1476(b) (4) of this title, a State need only conduct multidisciplinary assessments, develop individualized family service plans, and make available case management services.

(2) Notwithstanding paragraph (1), the Secretary may permit a State to continue to receive assistance under section 1473 of this title during such third year even if the State has not adopted the policy required by paragraph (1)(A) before receiving assistance if the State demonstrates in its application—

(A) that the State has made a good faith effort to adopt such a policy,

(B) the reasons why it was unable to meet the timeline and the steps remaining before such a policy will be adopted, and

(C) an assurance that the policy will be adopted and go into effect before the fourth year of such assistance.

(c) Fifth and succeeding years

In order to be eligible for a grant under section 1473 of this title for a fifth and any succeeding year of a State's participation under this subchapter, a State shall include in its application under section 1478 of this title for that year information and assurances demonstrating

to the satisfaction of the Secretary that the State has in effect the statewide system required by section 1476 of this title and a description of services to be provided under section 1476 (b) (2) of this title.

(d) Exception

Notwithstanding subsections (a) and (b) of this section, a State which has in effect a State law, enacted before September 1, 1986, that requires the provision of free appropriate public education to handicapped children from birth through age 2, inclusive, shall be eligible for a grant under section 1473 of this title for the first through fourth years of a State's participation under this subchapter.

§ 1476. Requirements for statewide system

(a) In general

A statewide system of coordinated, comprehensive, multidisciplinary, interagency programs providing appropriate early intervention services to all handicapped infants and toddlers and their families shall include the minimum components under subsection (b) of this section.

(b) Minimum components

The statewide system required by subsection (a) of this section shall include, at a minimum—

(1) a definition of the term “developmentally delayed” that will be used by the State in carrying out programs under this subchapter,

(2) timetables for ensuring that appropriate early intervention services will be available to all handicapped infants and toddlers in the State before the beginning of the fifth year of a State's participation under this subchapter,

(3) a timely, comprehensive, multidisciplinary evaluation of the functioning of each handicapped

infant and toddler in the State and the needs of the families to appropriately assist in the development of the handicapped infant or toddler,

(4) for each handicapped infant and toddler in the State, an individualized family service plan in accordance with section 1477 of this title, including case management services in accordance with such service plan,

(5) a comprehensive child find system, consistent with subchapter II of this chapter, including a system for making referrals to service providers that includes timelines and provides for participation by primary referral sources,

(6) a public awareness program focusing on early identification of handicapped infants and toddlers,

(7) a central directory which includes early intervention services, resources, and experts available in the State and research and demonstration projects being conducted in the State,

(8) a comprehensive system of personnel development,

(9) a single line of responsibility in a lead agency designated or established by the Governor for carrying out—

(A) the general administration, supervision, and monitoring of programs and activities receiving assistance under section 1473 of this title to ensure compliance with this subchapter,

(B) the identification and coordination of all available resources within the State from Federal, State, local and private sources,

(C) the assignment of financial responsibility to the appropriate agency,

(D) the development of procedures to ensure that services are provided to handicapped infants and toddlers and their families in a timely manner pending the resolution of any disputes among public agencies or service providers,

(E) the resolution of intra- and interagency disputes, and

(F) the entry into formal interagency agreements that define the financial responsibility of each agency for paying for early intervention services (consistent with State law) and procedures for resolving disputes and that include all additional components necessary to ensure meaningful cooperation and coordination,

(10) a policy pertaining to the contracting or making of other arrangements with service providers to provide early intervention services in the State, consistent with the provisions of this subchapter, including the contents of the application used and the conditions of the contract or other arrangements,

(11) a procedure for securing timely reimbursement of funds used under this subchapter in accordance with section 1481(a) of this title,

(12) procedural safeguards with respect to programs under this subchapter as required by section 1480 of this title,

(13) policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including—

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements

which apply to the area in which such personnel are providing early intervention services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the re-training or hiring of personnel that meet appropriate professional requirements in the State, and

(14) a system for compiling data on the numbers of handicapped infants and toddlers and their families in the State in need of appropriate early intervention services (which may be based on a sampling of data), the numbers of such infants and toddlers and their families served, the types of services provided (which may be based on a sampling of data), and other information required by the Secretary.

§ 1477. Individualized family service plan

(a) Assessment and program development

Each handicapped infant or toddler and the infant's or toddler's family shall receive—

(1) a multidisciplinary assessment of unique needs and the identification of services appropriate to meet such needs, and

(2) a written individualized family service plan developed by a multidisciplinary team, including the parent or guardian, as required by subsection (d) of this section.

(b) Periodic review

The individualized family service plan shall be evaluated once a year and the family shall be provided a review of the plan at 6 month intervals (or more often where appropriate based on infant or toddler and family needs).

(c) Promptness after assessment

The individualized family service plan shall be developed within a reasonable time after the assessment required by subsection (a) (1) of this section is completed. With the parent's consent, early intervention services may commence prior to the completion of such assessment.

(d) Contents of plan

The individualized family service plan shall be in writing and contain—

(1) a statement of the infant's or toddler's present levels of physical development, cognitive development, language and speech development, psycho social development, and self-help skills, based on acceptable objective criteria,

(2) a statement of the family's strengths and needs relating to enhancing the development of the family's handicapped infant or toddler,

(3) a statement of the major outcomes expected to be achieved for the infant or toddler and the family, and the criteria, procedures, and timeliness used to determine the degree to which progress toward achieving the outcomes is being made and whether modifications or revisions of the outcomes or services are necessary,

(4) a statement of specific early intervention services necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and the method of delivering services,

(5) the projected dates for initiation of services and the anticipated duration of such services,

(6) the name of the case manager from the profession most immediately relevant to the infant's or toddler's or family's needs who will be responsible for the implementation of the plan and coordination with other agencies and persons, and

(7) the steps to be taken supporting the transition of the handicapped toddler to services provided under subchapter II of this chapter to the extent such services are considered appropriate.

§ 1478. State application and assurances

(a) Application

Any State desiring to receive a grant under section 1473 of this title for any year shall submit an application to the Secretary at such time and in such manner as the Secretary may reasonably require by regulation. Such an application shall contain—

(1) a designation of the lead agency in the State that will be responsible for the administration of funds provided under section 1473 of this title,

(2) information demonstrating eligibility of the State under section 1474 of this title,

(3) the information or assurances required to demonstrate eligibility of the State for the particular year of participation under section 1475 of this title,

(4) (A) information demonstrating that the State has provided (i) public hearings, (ii) adequate notice of such hearings, and (iii) an opportunity for comment to the general public before the submission of such application and before the adoption by the State of the policies described in such application, and (B) a summary of the public comments and the State's responses,

(5) a description of the uses for which funds will be expended in accordance with this subchapter and, for the fifth and succeeding fiscal years a description of the services to be provided,

(6) a description of the procedure used to ensure an equitable distribution of resources made available

under this subchapter among all geographic areas within the State, and

(7) such other information and assurances as the Secretary may reasonably require by regulation.

(b) Statement of assurances

Any State desiring to receive a grant under section 1473 of this title shall file with the Secretary a statement at such time and in such manner as the Secretary may reasonably require by regulation. Such statement shall—

(1) assure that funds paid to the State under section 1473 of this title will be expended in accordance with this subchapter,

(2) contain assurances that the State will comply with the requirements of section 1481 of this title,

(3) provide satisfactory assurance that the control of funds provided under section 1473 of this title, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter and that a public agency will administer such funds and property,

(4) provide for (A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and (B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter,

(5) provide satisfactory assurance that Federal funds made available under section 1473(A) of this title will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for handicapped infants and toddlers and their families and in no case to supplant such State and local funds,

(6) provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under section 1473 of this title to the State, and

(7) such other information and assurance as the Secretary may reasonably require by regulation.

(c) Approval of application and assurances required

No State may receive a grant under section 1473 of this title unless the Secretary has approved the application and statement of assurances of that State. The Secretary shall not disapprove such an application or statement of assurances unless the Secretary determines, after notice and opportunity for a hearing, that the application or statement of assurances fails to comply with the requirements of this section.

§ 1479. Use of funds

In addition to using funds provided under section 1473 of this title to plan, develop, and implement the statewide system required by section 1476 of this title, a State may use such funds—

(1) for direct services for handicapped infants and toddlers and their families that are not otherwise provided from other public or private sources, and

(2) to expand and improve on services for handicapped infants and toddlers and their families that are otherwise available.

§ 1480. Procedural safeguards

The procedural safeguards required to be included in a statewide system under section 1476(b)(12) of this title shall provide, at a minimum, the following:

(1) The timely administrative resolution of complaints by parents. Any party aggrieved by the findings and decision regarding an administrative complaint shall have the right to bring a civil action with respect to the complaint, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(2) The right to confidentiality of personally identifiable information.

(3) The opportunity for parents or a guardian to examine records relating to assessment, screening, eligibility determinations, and the development and implementation of the individualized family service plan.

(4) Procedures to protect the rights of the handicapped infant or toddlers whenever the parents or guardian of the child are not known or unavailable or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State agency providing services) to act as a surrogate for the parents or guardian.

(5) Written prior notice to the parents or guardian of the handicapped infant or toddler whenever the State agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, placement, or the provision of appropriate early intervention services to the handicapped infant or toddler.

(6) Procedures designed to assure that the notice required by paragraph (5) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section.

(7) During the pendency of any proceeding or action involving a complaint, unless the State agency and the parents or guardian otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided or, if applying for initial services shall receive the services not in dispute.

§ 1481. Payor of last resort

(a) Nonsubstitution

Funds provided under section 1473 of this title may not be used to satisfy a financial commitment for services which would have been paid for from another public or private source but for the enactment of this subchapter, except that whenever considered necessary to prevent a delay in the receipt of appropriate early intervention services by the infant or toddler or family in a timely fashion, funds provided under section 1473 of this title may be used to pay the provider of services pending reimbursement from the agency which has ultimate responsibility for the payment.

(b) Reduction of other benefits

Nothing in this subchapter shall be construed to permit the State to reduce medical or other assistance available or to alter eligibility under title V of the Social Security Act (relating to maternal and child health) or title XIX of the Social Security Act (relating to medicaid for handicapped infants and toddlers) within the State.

§ 1482. State Interagency Coordinating Council

(a) Establishment

(1) Any State which desires to receive financial assistance under section 1473 of this title shall establish a State Interagency Coordinating Council composed of 15 members.

(2) The Council and the chairperson of the Council shall be appointed by the Governor. In making appointments to the Council, the Governor shall ensure that the membership of the Council reasonably represents the population of the State.

(b) Composition

The Council shall be composed of—

(1) at least 3 parents of handicapped infants or toddlers or handicapped children aged 3 through 6, inclusive,

(2) at least 3 public or private providers of early intervention services,

(3) at least one representative from the State legislature,

(4) at least one person involved in personnel preparation,

(5) other members representing each of the appropriate agencies involved in the provision of or payment for early intervention services to handicapped infants and toddlers and their families, and

(6) others selected by the Governor

(c) Meetings

The Council shall meet at least quarterly and in such places as it deems necessary. The meetings shall be pub-

licly announced, and, to the extent appropriate, open and accessible to the general public.

(d) Management authority

Subject to the approval of the Governor, the Council may prepare and approve a budget using funds under this subchapter to hire staff, and obtain the services of such professional, technical, and clerical personnel as may be necessary to carry out its functions under this subchapter.

(e) Functions of Council

The Council shall—

(1) advise and assist the lead agency designated or established under section 1476(b)(9) of this title in the performance of the responsibilities set out in such section, particularly the identification of the sources of fiscal and other support for services for early intervention programs, assignment of financial responsibility to the appropriate agency, and the promotion of the interagency agreements,

(2) advise and assist the lead agency in the preparation of applications and amendments thereto, and

(3) prepare and submit an annual report to the Governor and to the Secretary on the status of early intervention programs for handicapped infants and toddlers and their families operated within the State.

(f) Conflict of interest

No member of the Council shall cast a vote on any matter which would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest under State law.

(g) Use of existing Councils

To the extent that a State has established a Council before September 1, 1986, that is comparable to the Coun-

cil described in this section, such Council shall be considered to be in compliance with this section. Within 4 years after the date the State accepts funds under section 1473 of this title, such State shall establish a council that complies in full with this section.

§ 1483. Federal administration

Sections 1416, 1417 and 1420 of this title shall, to the extent not inconsistent with this subchapter, apply to the program authorized by this subchapter, except that—

(1) any reference to a State educational agency shall be deemed to a reference to the State agency established or designated under section 1476(b) (9) of this section,

(2) any reference to the education of handicapped children and the education of all handicapped children and the provision of free public education to all handicapped children shall be deemed to be a reference to the provision of services to handicapped infants and toddlers in accordance with this subchapter, and

(3) any reference to local educational agencies and intermediate educational agencies shall be deemed to be a reference to local service providers under this subchapter.

§ 1484. Allocation of funds

(a) Territories and insular possessions

From the sums appropriated to carry out this subchapter for any fiscal year, the Secretary may reserve 1 percent for payments to Guam, American Samoa, the Virgin Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, the Republic of Palau, and the Commonwealth of the Northern Mariana Islands in accordance with their respective needs.

(b) Secretary of Interior for assistance to Indians

(1) The Secretary shall make payments to the Secretary of the Interior according to the need for such assistance for the provision of early intervention services to handicapped infants and toddlers and their families on reservations serviced by the elementary and secondary schools operated for Indians by the Department of the Interior. The amount of such payment for any fiscal year shall be 1.25 percent of the aggregate of the amount available to all States under this subchapter for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under paragraph (1) only after submitting to the Secretary an application which meets the requirements of section 1478 of this title and which is approved by the Secretary. Section 1416 of this title shall apply to any such application.

(c) States

(1) For each of the fiscal years 1987 through 1991 from the funds remaining after the reservation and payments under subsections (a) and (b) of this section, the Secretary shall allot to each State an amount which bears the same ratio to the amount of such remainder as the number of infants and toddlers in the State bears to the number of infants and toddlers in all States, except that no State shall receive less than 0.5 percent of such remainder.

(2) For the purpose of paragraph (1)—

(A) the terms “infants” and “toddlers” mean children from birth to age 2, inclusive, and

(B) the term “State” does not include the jurisdictions described in subsection (a) of this section.

(d) Election by State not to receive allotment

If any State elects not to receive its allotment under subsection (c) (1) of this section, the Secretary shall reallot, among the remaining States, amounts from such State in accordance with such subsection.

§ 1485. Authorization of appropriations

There are authorized to be appropriated to carry out this subchapter \$50,000,000 for fiscal year 1987, \$75,000,000 for fiscal year 1988, and such sums as may be necessary for each of the 3 succeeding fiscal years.

APPENDIX G

CHAPTER 186-C

SPECIAL EDUCATION

186-C:1 Policy and Purpose. It is hereby declared to be the policy of the state that all children in New Hampshire be provided with equal educational opportunities. It is the purpose of this chapter to insure that the state board of education and the school districts of the state provide a free and appropriate public education for all educationally handicapped children.

186-C:2 Definitions. In this chapter:

I. "Educationally handicapped child" means any person 3 years of age or older but less than 21 years of age who has been identified and evaluated by a school district according to the provisions of RSA 186-C:7 and determined to be mentally retarded, hearing impaired, speech or language impaired or both, visually impaired, seriously emotionally disturbed, orthopedically impaired, otherwise severely health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of such impairment, needs special education or special education and educationally related services.

II. "Approved program" means a program of special education that has been approved by the state board of education and that is maintained by a school district, regional special education center, private organization or state institution for the benefit of educationally handicapped children, and may include a home-based program.

III. "Individualized education plan" means a written plan for the education of an educationally handicapped child that has been developed by a school district in accordance with rules adopted by the state board of education and that provides necessary special education or

special education and educationally related services within an approved program.

IV. "Special education" means instruction specifically designed to meet the unique needs of an educationally handicapped child.

V. "Educationally related services" means transportation and such developmental, corrective, and other supportive services as are specifically required by an individualized education plan to assist an educationally handicapped child to benefit from special education. "Educationally related services" do not include medical services unless such services are necessary for purposes of diagnosis and evaluation.

186-C:3 Special Education Bureau.

I. There is hereby established a special education bureau in the division of instructional services, department of education. The department shall appoint and assign such personnel or contract for services as may be necessary for proper operation of the bureau. The duties of the special education bureau shall be fully coordinated and integrated with the department's general curriculum and instruction activities.

II. The special education bureau shall include a research and demonstration unit. The unit shall, subject to available funding, study critical issues and problems facing teachers, local district administrators, department officials, and elected policy makers concerning special education and develop and propose practical solutions to those problems.

186-C:3-a Duties.

I. The primary duty of the special education bureau shall be to help school districts meet their responsibilities under this chapter and under federal law regarding the education of educationally handicapped children. The

special education program of the department of education shall develop and analyze information on issues and problems of regional and statewide importance and on assisting school districts in dealing with these issues and problems. The department shall ensure that the bureau's regulation and monitoring of school district activities shall not exceed what is necessary for compliance with this chapter and with federal law regarding the education of educationally handicapped children.

II. The bureau shall, subject to available funding, develop, implement and evaluate statewide special education policies, standards and programs. In carrying out this mission, the bureau shall gather and collect data and organize and analyze instruction about programs, conditions and trends in special education in the state. In addition, the bureau shall be responsible for monitoring and maintaining information about national and regional trends, instructions and issues affecting special education in New Hampshire. The bureau shall make this information available to the districts and use this information to:

(a) Assess the needs of school districts for assistance in carrying out their responsibilities for educating handicapped children;

(b) Identify cost effective alternative programs for serving educationally handicapped children;

(c) Focus resources on students requiring extensive services; and

(d) Develop cost and service level benchmarks for special education in New Hampshire which may be used as reference points by districts to measure the effectiveness of their programs in meeting educational goals and objectives.

III. The special education bureau shall provide technical assistance and information to the school districts

so that the districts may effectively and efficiently identify, clarify and address their specific responsibilities under state and federal special education laws. This assistance shall include the provision of mediation services to resolve special education disputes and the provision of expertise regarding specific educationally handicapping conditions. Whenever technical assistance of a specialized nature, beyond that available in the department, is required, the bureau shall assume a leadership role in identifying sources of such assistance in other state agencies, the federal government, volunteer services or the private sector.

IV. The special education bureau shall administer those federal and state funding programs for special education assigned to it by law. The bureau shall also make recommendations to the state board regarding management systems, standard definitions and procedures in order to provide uniform reporting of special education services and expenditures by school districts and school administrative units.

V. The special education bureau shall monitor the operations of local school districts regarding compliance with state and federal laws regarding the education of educationally handicapped students. The bureau's regulatory program shall be structured and implemented in a prudent manner and shall not place an excessive administrative burden on local districts. The bureau and districts shall approach monitoring and regulation in a constructive, cooperative manner with a goal of improving special education in New Hampshire.

VI. In any school district in which 10 percent or more of the pupils are classified as educationally handicapped, the bureau shall study those districts and their special education programs to determine the reasons for the unusually high percentage of handicapped students.

186-C:4 Comprehensive State Special Education Plan.

I. The department shall, by October 1, 1987, and every 6 years thereafter, publish a written comprehensive 6-year plan for the education of handicapped students in New Hampshire.

II. The department shall continually review this plan and publish a revision every 2 years. On or before December 1 of each even numbered year, the department shall review the plan with the standing committees of the house and senate having jurisdiction over matters relating to special education.

III. The comprehensive plan shall include:

(a) A well documented and statistically supported analysis of statewide needs and trends regarding the education of educationally handicapped students. This analysis shall clearly document the relative intensity of statewide special educational needs on either a regional or district basis.

(b) A statement of long-term goals and short-term objectives for special education in New Hampshire and a projection of how the department's programs and operations are expected to effect these goals and objectives during the period covered by the plan.

(c) A statement of the measures which the department recommends be used to evaluate its performance in terms of its statement in subparagraph (b) for the period covered by the plan. In this regard, the department shall recommend realistic, quantifiable performance measures for each federal and state program which it operates. In subsequent revisions to the plan, the department shall use the established measures as a basis for reporting its performance in this section of the plan.

(d) A statement of the department's informational needs and the degree to which current data bases and information systems meet those needs. This review shall

also identify types of data received from districts which are redundant or outdated and should be deleted.

(e) An action plan summarizing the programs, strategies, and methods which the department plans to use in achieving its goals and objectives.

IV. The comprehensive plan shall serve as a basis for the department's budget requests regarding special education.

V. In developing the comprehensive state special education plan, the department shall consult with the local school districts, related state agencies, and other members of the state's educational community so as to properly perform its duties.

186-C:5 Program Approval. The state board of education shall adopt rules establishing standards for the approval of programs of education that are maintained by school districts, regional special education centers, and private organizations or state institutions for the benefit of educationally handicapped children, including home-based programs.

186-C:6 Census. Each school district shall report annually by October 1 to the state board of education on forms provided by the board the number of educationally handicapped children in such school district who have been identified and evaluated according to state standards. A later report shall be made when any other educationally handicapped child shall be located in the district.

186-C:7 Individual Education Plans.

I. The development of an individualized education plan for each educationally handicapped child shall be the responsibility of the school district in which the child resides or of the school district which bears financial responsibility for the child's education.

II. The parents or legal guardian of an educationally handicapped child have the right to participate in the development of the individualized education plan for the child and to appeal decisions of the school district regarding such child's individualized education plan as provided in rules adopted in accordance with RSA 541-A by the state board of education.

III. The special education bureau of the department of education shall assist each school district in developing an approved program or programs for educating the educationally handicapped children of the district including the setting of approved rates for private providers of special education services pursuant to RSA 21-N:5, I(h).

IV. Any individual education plan which includes a residential placement, and for which total education costs exceed \$20,000 shall be reviewed and approved by the special education bureau of the department of education, according to procedures adopted by the bureau. If such individual education plan is not approved, the bureau shall develop an alternative individual education plan.

186-C:7-a. Interagency Agreement for Special Education.

I. The commissioner of education, with the approval of the state board of education, and the commissioner of health and human services shall enter into a comprehensive, cooperative special education agreement to ensure the provision of necessary services by their agencies to educationally handicapped children.

II. This agreement shall address programs and services for each appropriate category of educationally handicapped children.

III. For each category of educationally handicapped children, the agreement shall include:

(a) A definition of the specific population to be served.

(b) An identification and description of the services available through each agency.

(c) A description of the specific programmatic and financial responsibilities of each department.

(d) An estimate of the costs of, and source of funds for, all services to be provided by each department.

(e) A method for implementing and administering the agreement which shall include a procedure for settling disputes regarding its administration or the financial and programmatic responsibilities of each department.

(f) A procedure for monitoring the operation of the agreement and for revising it periodically as necessary.

IV. The commissioners of education and health and human services shall submit a copy of the initial inter-agency agreement for special education to the appropriate standing committees of each house of the general court on or before September 1, 1985. Any subsequent proposed amendments or revisions to the agreement shall be submitted to the appropriate standing committees of the house and senate.

186-C:8 Collaborative Programs.

I. School districts or school administrative units, or both, may enter into cooperative agreements in order to provide approved programs for educating educationally handicapped children in regional special education centers. The state board of education, when appropriate because of a low incidence of a handicapping condition, high cost of services, or scarcity of trained personnel, shall encourage such cooperative agreements and shall serve as a source of information, advice and guidance to school districts, school administrative units, or both.

II. The state board of education, together with representatives of neighboring states, shall study the feasibility of interstate agreements or interstate compacts for

the provision of services to educationally handicapped students.

186-C:9 Education Required. Each child determined by the local school district as being educationally handicapped in accordance with RSA 186-C:2 and in need of special education or special education and educationally related services shall be entitled to attend an approved program which can implement the child's individualized education plan. Such child shall be entitled to continue in an approved program until such time as the child has acquired a high school diploma or has attained the age of 21, whichever occurs first, or until the school district responsible for developing the child's individualized education plan determines that the child no longer requires special education in accordance with the provisions of this chapter.

186-C:9-a. Educationally Related Services.

I. Educationally related services shall be related to one or more educational objectives in the educationally handicapped child's individualized education plan.

II. Residential services shall be considered an educationally related service when necessary for an educationally handicapped child to benefit from special education and when placement in a residential facility has been made by the legally responsible school district in order to comply with RSA 186-C:9 or 11, or when placement has been ordered by a hearings officer or by a court of competent jurisdiction on appeal, pursuant to rules adopted by the state board of education under RSA 186-C:16, IV.

186-C:10 Responsibility of School District. A school district shall establish an approved program or programs for educationally handicapped children, or shall enter into cooperative agreements with other districts to provide approved programs for educationally handicapped chil-

dren, or shall pay tuition to such an approved program maintained by another school district or by a private organization. Eligibility for participation in an approved program of special education shall be determined by the school board of the school district under rules adopted by the state board of education.

186-C:11 Transportation. Each school district shall furnish suitable transportation to all educationally handicapped children whose individualized education plan requires such transportation. The school district may board a child near the place where instruction is to be furnished and shall provide transportation if required by the child's individualized education plan from the place where the child is boarded to the place of instruction.

186-C:12 Federal Assistance. The state board of education is authorized to cooperate with the federal government or any agency of the federal government in the development of any plan for the education of educationally handicapped children and to receive and expend, in accordance with such plan, all funds made available to the state board of education from the federal government or any of its agencies, the state or from other sources. The several school districts of the state are authorized to receive, incorporate in their budgets, and expend for the purposes of this chapter such funds as may be made available to them through the state board of education from the federal government or any of its agencies.

186-C:13 Liability for Expenses.

I. All expenses incurred by a school district in administering the law in relation to education for educationally handicapped children shall be paid by the school district where the child resides, except as follows:

(a) When an educationally handicapped child is placed in a home for children or health care facility as defined

in RSA 193:27, the liability for expenses for such child shall be determined in accordance with RSA 193:29.

(b) When an educationally handicapped child is placed in a state institution, the liability for expenses for such child shall be determined in accordance with RSA 186-C:19.

II. For the purposes of meeting the financial obligation for expenses incurred under this chapter, a school district may exceed its annual budget to the extent of additional special education aid which the district has actually received from the state after the annual school district budget was approved.

III. No school district shall be required to pay the expenses of the education program of a child adjudicated under RSA 169-B, 169-C, or 169-D except as provided by RSA 186-C.

186-C:14 Surrogate Parents.

I. PURPOSE. The purpose of this section is to protect the educational rights of eligible, educationally handicapped children.

II. DEFINITIONS. The following words as used in this section shall be construed as follows:

(a) "Surrogate parent" shall mean a person appointed to act as a child's advocate in place of the child's natural parents or guardian in the educational decision-making process.

(b) "Educational decision-making process" shall include identification, evaluation, and placement as well as the hearing, mediation, and appeal procedures.

(c) "Unavailable parent" shall include a parent or guardian whose location is unknown or who is otherwise unable to act as the child's advocate in the educational decision-making process.

(d) [Repealed.]

III. DETERMINING NEED. When, in the opinion of the commissioner of education or his designee, an educationally handicapped child, as defined in RSA 186-C:2, needs special education and the parent or guardian of the child is unknown or unavailable or the child is a ward of the state, the commissioner or his designee shall appoint a surrogate parent who shall represent said child in the educational decision-making process.

IV. APPOINTMENT OF SURROGATE. Once the commissioner of education or his designee determines that a surrogate parent is needed, the commissioner or his designee shall appoint a surrogate parent. Said appointment shall be effective until the child reaches 18 years of age, and may be extended by order of the commissioner until the child graduates from high school or reaches 21 years of age, whichever occurs first. If the surrogate parent resigns, dies or is removed, the commissioner of education or his designee may appoint a successor surrogate parent in the same manner as provided in paragraph III.

V. RIGHT OF ACCESS. When a surrogate parent is appointed, he shall have the same right of access as the natural parents or guardian to all records concerning the child. These records shall include, but not be limited to, educational, medical, psychological and welfare records.

VI. LIMITED LIABILITY. No surrogate parent appointed pursuant to the provisions of paragraph IV shall be liable to the child entrusted to him or the parents or guardian of such child for any civil damages which result from acts or omissions of such surrogate parent which may arise out of ordinary negligence. This immunity shall not apply to acts or omissions constituting gross, willful, or wanton negligence.

VII. RULES. The state board of education shall adopt rules necessary for the administration of the provisions of this section.

186-C:15 Length of School Year. The length of the school year for an educationally handicapped child shall be the same as that provided by the local school district for a child not educationally handicapped, except that the local school district shall provide an approved program for an extended period when it can be demonstrated by a preponderance of evidence, in accordance with rules adopted by the state board of education, that interruption of the program of an educationally handicapped child would result in severe and substantial harm and regression and would have the effect of negating the benefits of such educationally handicapped child's regular special education program.

186-C:16 Rulemaking. The state board of education shall adopt rules, pursuant to RSA 541-A, relative to:

- I. Developing individualized education plans;
- II. Approving special education programs;
- III. Reporting the number of educationally handicapped children in a school district;
- IV. Appealing school district decisions regarding individualized education plans;
- V. Determining eligibility for participation in approved programs;
- VI. Appointing surrogate parents;
- VII. Determining the length of the school year for handicapped children; and
- VIII. Other matters related to complying with provisions of this chapter.

186-C:17 Limitation of Provisions. Nothing in this chapter shall be construed as authorizing any public official, agent, or representative, in carrying out any of the provisions of this chapter to take charge of any child

over the objection of either of the parents of such child, or of the person standing in loco parentis to such child except pursuant to a proper court order.

186-C:18 State Aid.

I. As used in this section:

(a) "District equalized valuation per pupil" means the equalized value per pupil in a school district as calculated by the department of education.

(b) "State equalized valuation per pupil" means the same as calculated by the department of education.

(c) "Commissioner" means the commissioner of education.

(d) "State catastrophic aid factor" means the total of all district catastrophic aid factors from all school districts in the state that have catastrophic costs calculated as provided in subparagraph III(a).

II. The state shall distribute the funds known as special education basic aid funds as directed by the formula established in RSA 198:29.

III. The state shall appropriate not less than \$1,000,000 for each fiscal year to assist school districts in meeting catastrophic cost increases in their special education programs. The state board of education through the commissioner shall distribute aid available under this paragraph to such school districts as have a special education pupil for whose costs they are responsible, for whom the costs of special education in the fiscal year exceed $3\frac{1}{2}$ times the state average expenditure per pupil for the school year preceding the year of distribution. The amount to be distributed to a school district under this paragraph shall be determined through the following formulae:

$$(a) \left\{ \frac{\text{State equalized valuation per pupil}^2}{\text{District equalized valuation per pupil}} \right\} \times$$

$$\frac{\text{Cost of catastrophic aid students in district}}{\text{District catastrophic aid factor}} =$$

$$(b) \left\{ \frac{\text{District catastrophic aid factor}}{\text{State catastrophic aid factor}} \right\} \times \frac{\text{Catastrophic aid appropriation}}{\text{District catastrophic aid share}} =$$

provided that the amount of catastrophic aid per pupil for a district requiring such aid shall not be more than 80 percent of catastrophic costs exceeding 3-1/2 times the state expenditure per pupil for the school year preceding the year of distribution for that district. If there are unexpended funds appropriated under this paragraph at the end of any fiscal year, such funds shall be distributed according to the equalizing formulae established in paragraph II. The "cost of catastrophic aid students in district" as used in this paragraph shall include the total cost, i.e., both the 3-1/2 times the state average expenditure per pupil for the school year preceding the year of distribution which must be exceeded to be eligible for aid under this paragraph and any sums in excess of such expenditure limit. The state may designate up to \$250,000 of the funds which are appropriated as required by this paragraph, for each fiscal year to assist those school districts which, under guidelines established by rules of the state board of education, may qualify for emergency assistance for special education costs. Upon application to the commissioner of education, and approval by the commissioner, such funds may be accepted and expended by school districts in accordance with this chapter; provided, however, that if a school district has received emergency assistance funds for certain educationally handicapped children, it shall not receive catastrophic funds for those same educationally handicapped children. If any of the funds designated for emergency assistance under this paragraph are not used for such emergency assistance purposes, the funds shall be used to assist school districts in meeting catastrophic cost in-

creases in their special education programs as provided by this paragraph.

IV. The state shall appropriate \$300,000 for each fiscal year to assist special education programs that are statewide in their scope, and that meet the standards for such programs established by the state board of education. Funds under this paragraph shall be administered and distributed by the state board of education through the commissioner.

V. The state board of education shall adopt rules pursuant to RSA 541-A relative to:

(a) Prescribing the forms to be used to apply for any benefit covered by any other subparagraph of this paragraph;

(b) Administering and distributing aid;

(c) [Repealed.]

(d) School districts applying for catastrophic aid under paragraph III;

(e) School districts identifying catastrophic costs under paragraph III;

(f) Establishing standards for statewide special education programs under paragraph IV.

VI. The state board of education shall distribute through the commissioner:

(a) Catastrophic aid payments under paragraph III on or before January 1. School districts shall submit their catastrophic costs to the state board of education by June 30 of each fiscal year. The state board of education shall then verify the cost and distribute the appropriate amounts for the previous fiscal year on or before January 1 of each fiscal year.

(b) Aid to statewide special education programs under paragraph IV before June 30.

VII. In Cheshire county, upon request of such a school district and upon approval by the county convention, the county may raise and appropriate funds to pay a portion of such costs for special education under this section.

186-C:19 Educationally Handicapped Children in State Institutions.

I. For an educationally handicapped child in a state institution, the school district responsible for selecting and funding the child's special education or special education and educationally related services shall be as follows:

(a) If such child is in the legal custody of the parent, the school district in which the child's parent resides shall be the liable school district.

(b) If such child is not in the legal custody of the parent, or if the parent resides outside the state, the school district in which the child most recently resided other than in a state institution, home for children or health care facility as defined in RSA 193:27 shall be the liable school district.

(c) For the purposes of this chapter, children 18 years of age or older but less than 21 years of age at Laconia developmental services or at the Philbrook center shall be deemed to be in the legal custody of their parents if they were in such legal custody upon reaching the age of 18.

(d) For the purposes of this section a parent shall not have legal custody if legal custody has been awarded to some other individual or agency, even if that parent retains residual parental rights. An award of legal custody by a court of competent jurisdiction, in this state

or any other state, shall determine legal custody under this section.

II. For an educationally handicapped child in a state institution, the responsible school district shall be liable for all expenses incurred in administering the law in relation to educationally handicapped children except as follows: For the 1982 and 1983 fiscal years, the responsible school district's annual financial liability for a child who was enrolled at the Laconia state school and training center as of July 1, 1981, shall not exceed the applicable state average per pupil cost as determined by the state board of education, and the state shall be liable for the balance of such costs, which shall in no case be taken from the \$10,000,000 appropriated for state aid under RSA 186-C:18. If more than one school district is liable for such a child during a single fiscal year, the total annual financial liability to the school districts shall not exceed the applicable state average per pupil cost, said liability to be prorated on a per diem basis. For such a child who is enrolled at Laconia developmental services for less than a full year, the liability for such costs shall be prorated on a per diem basis by Laconia developmental services.

III. Nothing in paragraphs I or II of this section shall diminish the responsibility of the financially liable school district as defined in paragraphs I and II to develop and implement an individualized education plan or to fulfill its obligations under other sections of this chapter for an educationally handicapped child in a state institution, regardless of whether such child was initially placed by a school district, the parent or some other agent.

IV. "State institution" as used in this section means the Philbrook center for children and youth and Laconia developmental services. If a special education program at a state institution is the least restrictive placement and offers appropriate services for an educationally hand-

icapped child, such institution shall be utilized by a local school district for such child, subject to the approval of said institution.

186-C:19-a Educationally Handicapped Children at the Youth Development Center, the State Prison, and the Philbrook Center.

I. For an educationally handicapped child at the youth development center or the state prison, or who is placed at the Philbrook center while awaiting disposition of the court following arraignment pursuant to RSA 169-B:13, the school district responsible for the development of an individualized education plan shall be as follows:

(a) If such child is in the legal custody of the parent, the school district in which the child's parent resides shall be responsible.

(b) If such child is not in the legal custody of the parent or if the parent resides outside the state, the school district in which the child most recently resided other than in a state institution, home for children or health care facility as defined in RSA 193:27 shall be responsible.

(c) For the purposes of this section a parent shall not have legal custody if legal custody has been awarded to some other person or agency, even if that parent retains residual parental rights. An award of legal custody by a court of competent jurisdiction, in this state or in any other state, shall determine legal custody under this section.

II. The school district liability for educational expenses for an educationally handicapped child in the youth development center or the state prison, or who is placed in the Philbrook center while awaiting disposition of the court following arraignment pursuant to RSA 169-B:13,

shall not exceed the state average elementary cost per pupil, as determined by the state board of education for the preceding school year.

186-C:19-b Liability for Educationally Handicapped Children in Certain Court Ordered Placements.

I. As used in this section "children in placement for which the division for children and youth services has financial responsibility" means all children receiving special education or special education and educationally related services whose placements were made pursuant to RSA 169-B, 169-C or 169-D, except children at the youth development center and children placed at the Philbrook center while awaiting disposition of the court following arraignment pursuant to RSA 169-B:13.

II. The school district liability for expenses for special education or for special education and educationally related services for an educationally handicapped child in placement for which the division for children and youth services has financial responsibility shall be limited to 3 times the state average cost per pupil, as determined by the state board of education for the preceding school year. The liability of a school district under this section shall be prorated if the placement is for less than a full school year and the district shall be liable for only the prorated amount. This section shall not limit a school district's financial liability for children who receive special education or special education and educationally related services in a public school or program identified in RSA 186-C:10.

(a) Any costs of special education or special education and educationally related services in excess of 3 times the state average cost per pupil shall be the liability of the department of education. Costs for which the department of education is liable under this section shall be paid to education service providers by the department

of education. The department of education shall develop a mechanism for allocating the funds appropriated for the purposes of this section.

(b) The division for children and youth services shall be liable for all court-ordered costs pursuant to RSA 169-B:40, 169-C:27 and 169-D:29 other than for special education or special education and educationally related services.

III. The department of education shall by rules adopted under RSA 541-A establish the rates charged by education service providers to the department of education or to school districts for educationally handicapped children in placement for which the division for children and youth services has financial responsibility.

IV. The department of education is authorized to receive and take appropriate action on complaints regarding the failure to provide necessary special education or special education and educationally related services to educationally handicapped children in placement for which the division for children and youth services has financial responsibility.

186-C:20 Special Education Program of the Philbrook Center for Children and Youth.

I. Notwithstanding the provisions of any other law to the contrary, the expenses for an educationally handicapped child assigned to the special education program at the Philbrook center for children and youth shall be the responsibility of the school district so assigning the child. Such a school district shall pay the rate established for the special education program of the Philbrook center.

II. The special education program of the Philbrook center shall receive all the moneys paid under this section and is authorized to receive and expend such funds to

operate the program. Such expenditures shall be subject to the approval of the legislative fiscal committee.

186-C:21 Development of In-state Services for Severely Multihandicapped Developmentally Disabled Children.

I. The special education bureau of the department of education and the department of health and human services, division of mental health and developmental services, shall, subject to approval by the commissioner of education and the commissioner of health and human services, develop a joint plan for establishing a regional system of in-state, community-based residential and educational services for severely multi-handicapped developmentally disabled children, ages 3-21. The plan shall also address the development of staff and educators with expertise in serving this population.

II. Under this plan the department of education shall be responsible for all services to severely multi-handicapped children, age 3-21, established by a local pupil planning team in accordance with P.L. 94-142 and RSA 186-C, within the limits of appropriated funds.

III. The department of health and human services, division of mental health and developmental services, shall provide technical assistance to and cooperate with the department of education in the development of any programs under this joint plan.

IV. For children receiving services under this plan, the legally responsible school district shall be responsible for paying, each year, \$10,000 plus 20 percent of the additional cost, with the state funding the balance of the cost through funds appropriated to the department of education. For children receiving services under this plan, the legally responsible school district shall be determined in accordance with RSA 186-C:19, I(a) and (b).

V. For the purposes of this section "severely multi-handicapped children" shall be defined as a sub-category of those educationally handicapped children who are identified by local school districts as multi-handicapped, or severely or profoundly mentally retarded and who are provided with an individualized education plan in accordance with RSA 186-C:7.

186-C:22 Development of In-state Services for Severely Emotionally Disturbed Children.

I. The department of education, special education bureau and the department of health and human services, division of mental health and developmental services, shall, subject to approval by the commissioner of education and the commissioner of health and human services, develop a joint plan for establishing a regional system of in-state, community based residential and educational services for severely emotionally disturbed children, ages 3-21. The plan shall also address the development of staff and educators with expertise in serving this population.

II. Under this plan the department of education shall be responsible for all services to severely emotionally disturbed children, ages 3-21, established by a local pupil planning team in accordance with P.L. 94-142 and RSA 186-C, within the limits of appropriated funds.

III. The department of health and human services, division of mental health and developmental services, shall provide technical assistance to and cooperate with the department of education in the development of any programs under this joint plan.

IV. For children receiving services under this plan, the legally responsible school district shall be responsible for paying, each year, \$10,000 plus 20 percent of the additional cost, with the state funding the balance of the cost through funds appropriated to the department of education. For children receiving services under this

plan, the legally responsible school district shall be determined in accordance with RSA 186-C:19, I(a) and (b).

V. For the purposes of this section "severely emotionally disturbed children" shall be defined as a subcategory of those educationally handicapped children who are identified by local school districts as seriously emotionally disturbed and who are provided with an individualized education plan in accordance with RSA 186-C:7.

(3)
No. 89-515.

Supreme Court, U.S.

FILED

OCT 27 1989

JOSEPH F. SPANIOL, JR.
CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1989.

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
PETITIONER,

v.

TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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Questions Presented.

I. Whether the plain language contained of the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400 *et seq.*, directing States and local education agencies to provide a free appropriate public education to all handicapped children regardless of the severity of handicap, prohibits excluding a child considered by the education agency to be too severely handicapped to benefit from educational services.

II. Whether under the Education for All Handicapped Children Act the definition of education is broad enough to encompass the provision of services, such as physical and occupational therapy, to profoundly handicapped children.



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No. 89-515.

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1989.

**ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
PETITIONER,**

v.

**TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
RESPONDENT.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent Timothy W. respectfully requests that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit be denied.

Statement of the Case.

This case involves Timothy W., a thirteen year old child who, in his short life, has been excluded from public education for seven years, has received inadequate education for four years, and whom the Petitioner, Rochester School District, seeks to exclude from education for the rest of his life. The Petitioner contends that the United States Court of Appeals for the First Circuit erred in holding that the plain language of the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1400 *et seq.*, its legislative history, and case law prohibit a school district from refusing to provide a handicapped child with a free appropriate public education, including special education and related services, when the school district considers that the child does not have the capacity to benefit from educational services.

Respondent Timothy W. was born on December 8, 1975. He lives in Rochester, New Hampshire with his mother, Cynthia; two brothers (one of whom is severely handicapped); and a sister (App. VI, 1292-1294). He has lived in Rochester all his life.

Timothy has severe physical handicaps and profound mental retardation. Due to complications which arose during his birth, he was hospitalized on several occasions during the first year of his life, and experienced a number of very serious problems, including an intracranial hemorrhage, subdural effusions, seizures, and hydrocephalus. The hydrocephalus was treated with a ventriculoperitoneal shunt to drain fluid from his head (App. III, 464-465).

Despite those devastating conditions, most professionals who have worked with Timothy agree that he has educational needs, and that he can benefit from education. For example, reports of the ABLE and Child Development Center programs indicate that, during his placements there, Timothy demonstrated abilities in several educational areas such as visual, auditory, and tactile development, as well as in the areas of

cognition, communication, and language (App. III, 491-492, 536). Other reports and testimony indicate that Timothy can benefit from an education, but that his educational program and placement must involve persons of various disciplines, must be consistent, and must include, as an integral part of the program, the provision of physical and occupational therapy (App. I, 64-73; App. III, 531-534; *see also* App. III, 568-745). Finally, reports and testimony of experts also identified specific educational needs, and recommended specific educational services and programs for Timothy, the core of which would consist of physical and occupational therapy (*see especially* Report of Morse, App. III, 524, and Affidavit of Schofield (App. VI, 1360-1369).) These reports and testimony indicate that Timothy would benefit from such services and program through increased participation in his daily routine, more control over his body, and increased ability to communicate his wants and needs (*see especially* Report of Kugel, App. III, 540-542, and Cloninger, Edelman, and Iverson, App. III, 555-557); gave examples of other children as severely handicapped as Timothy who routinely receive and benefit from public educational programs (*see especially* Report of Cloninger, Edelman, and Iverson, App. III, 549-553, and Testimony of Riggio, App. I, 70-72); and stressed that without an educational program Timothy's prospects for making any educational progress are nil (Testimony of Schwaninger, App. II, 298-299).

Timothy turned three years old in 1978, which was, coincidentally, the very year by which States, under the EAHCA, had "to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State . . ." 20 U.S.C. § 1412(2)(B). The school district was aware of Timothy's needs shortly after he turned three years old (App. V, 1098). Timothy was, however, not provided with any educational services that year, or at any time until May 1985, and only then as a consequence of the filing of this action, and of having been ordered to do so by the

Commissioner of the New Hampshire Department of Education acting on a complaint filed by Timothy's mother¹ (App. IV, 835, 839-847, and 874).

During the seven years between Timothy's identification and the first provision of educational services in 1985, the school district team met four times to consider his entitlement to an education. The first meeting did not occur until February 19, 1980, when Timothy was five. At the following meeting in March 1980, the school district decided that he was not entitled to receive an education.

According to the minutes of the March 1980 meeting, the statements of Kathryn VanZandt, the Director of Pupil Services in Rochester, appear to reflect the prevailing view of the members of the team who decided that Timothy was not educationally handicapped:

Mrs. VanZandt said she was looking at what we know of education in the traditional sense, and she did not feel that is what Timmy needs; therefore, he

¹ Petitioner's contention that Timothy received "extensive" services (Petition at 3) from the time he was a year old is not supported by the record. During 1976 and 1977, after his release from the hospital, Timothy was seen, at most, only once a week at the Rochester Well Baby Clinic and the Portsmouth Rehabilitation Center's Preschool and Home Program (App. III, 467; App. IV, 748, 885, 888). From 1977 to 1981, while Timothy did attend the Child Development Center, funded through the Disabled Children's Program of the Social Security Act, 42 U.S.C. § 1382, it appears that he did so no more than three times a week (App. IV, 765-771, 802). Furthermore, Timothy did not even have a service plan until 1980, and even then that service plan bore little resemblance to the Individualized Education Program (IEP) required by the EAHCA; it contained few, if any, of the elements of an IEP required by 34 C.F.R. § 300.346, and it was not developed in accordance with the procedures mandated by 34 C.F.R. §§ 300.344(a)(3) and 300.345, including the requirement of parental participation (App. IV, 798-802). In any case, by mid-1980, Social Security funding for services was discontinued because Timothy became ineligible (App. I, 12-13). After July of 1980, and until he entered the ABLE program in May 1985, Timothy's total program of services consisted of respite care four times per week, physical therapy once every two months, and one home visit every two months (App. I, 38-39; App. IV, 802). In comparison, had he been in a special education program, he would have received, at least, 5¼ hours per day and 180 days per year of education.

should not be considered handicapped. She continued that she felt he should receive services, but not educational services. Mrs. VanZandt added that she did not feel it was a local district's responsibility for funding; it is a larger issue than that.

(App. IV, 793).² As a result of this decision, the school district made no effort to evaluate Timothy or provide him with an educational program in 1981 and 1982.³

²To be sure, throughout this case, there has been considerable debate about whether Timothy could benefit from an education. As reflected by Mrs. VanZandt's statement, this debate appears to have turned as much on one's personal philosophy of education as anything else. Thus, in one camp there were those such as Dr. Rozycki, who indicated in a letter that Timothy "has no potential for development of self-care functions and has no educational potential." And in the other camp were persons such as Dr. Mackey, Timothy's treating physician, who on numerous occasions stated his belief that Timothy needed a program of "daily educational therapy," which program included "therapeutic exercise, developmental stimulation, muscle strengthening, range of motion, and developmental activities" and a range of services such as occupational and physical therapy, and tactile stimulation (App. III, 472 and 470; App. IV, 772 and 782-788); Susan Curtis, M.S., who had written a report recommending the establishment of a number of educational goals and objectives for Timothy in order to increase his ability to locate to sound, to teach him appropriate social responses to his name, and to teach him to reach for and interact with objects or toys (App. III, 476-480); Mary Bamford, who recommended a program of positioning and stimulation to enable Timothy to interact with his environment (App. III, 473-475); and Lynn Miller, who described Timothy's needs as including "postural drainage, range of motion, sensory stimulation of all kinds, correct positioning, proper sitting equipment and work with his head control." (App. I, 46-47; App. III, 486-487.)

³These actions were taken in contravention of State policy. As pointed out by the New Hampshire Department of Education, in a report issued as a result of a May, 1982 on-site review of the Rochester School District:

Two years ago, a student was determined not to be capable of benefiting from special education services because of the severity of his handicapping conditions. Even though the State Board of Education has recently taken the general position that districts cannot use "capable of being benefited from (by) instruction" as an appropriate criterion for denying eligibility for special education services, the District has not reviewed this student (approximately age 6) nor has the District provided the parents with the opportunity to exercise their rights of due process.

(App. V, 1081, 1136-1137.)

In January 1984, it appeared, briefly, that the school district was about to reverse its position when the placement team, based upon a report by Lynn Miller, an expert in the field of providing occupational and physical therapy to physically handicapped children in educational programs, identified seven educational needs for Timothy, and recommended placement at the Child Development Center (App. IV, 823). However, the Rochester School Board, at their February 9, 1984 meeting, in essence vetoed the special education program and placement recommended by the team.⁴ It did this by tabling the request for funds for this program and placement on the grounds that it needed additional information. (Testimony of Jon Gale, App. I, 147-149; App. IV, 829.)

On November 17, 1984, Timothy W. filed this action contending that the longstanding refusal of the Petitioner to provide him with a free appropriate public education violated the rights guaranteed to him by the EAHCA; corresponding State law, R.S.A. 186-C and its implementing regulations, the New Hampshire Standards, Ed 1101, *et seq.*; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Fourteenth Amendment to the Constitution of the United States (App. V, 1078-1097). Timothy sought an order requiring the school district to provide him with an education and \$175,000 in damages.

After denying Timothy's motion for preliminary injunction and the school district's motion to dismiss (App. V, 1154-1167, 1168-1172), the district court, on May 20, 1987, remanded Timothy's EAHCA claim to the hearing officer of the New Hampshire Department of Education and stayed action on all other claims until the administrative proceedings had been exhausted (App. V, 1221-1242).

On October 14, 1987, over Timothy's objection, the hearing officer of the New Hampshire Department of Education granted

⁴ This decision was made despite the clear requirement that placement team decisions be made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.533(a)(3).

the school district's motion for a ruling on the legal relevance of his capacity to benefit from special education prior to a hearing on the merits (App. VI, 1337-1338). After the submission by the parties of the documentary evidence only, the hearing officer ruled on the basis of the EAHCA and State law that his capacity to benefit was not legally relevant and that he was entitled to receive a free appropriate public education (Pet. App. 62a).

The school district appealed the decision of the hearing officer and moved for summary judgment, requesting that the decision be reversed and that Timothy's EAHCA and State law claims be remanded again for a full evidentiary hearing on whether Timothy could "benefit" from special education (App. V, 1244-1246, 1255-1257). On July 15, 1988, after a two-day expedited hearing on the merits, the court ruled that a capacity to benefit standard could be used to determine Timothy's eligibility for special education and that Timothy was ineligible (Pet. App. 40a).

In reaching its decision, the district court indicated that in its view a handicapped child is not entitled to "attempted education" if that child is found to be "incapable of cognitive learning." (Pet. App. 45a.) The court also placed great weight on the testimony of Dr. Patricia Andrews, the school district's expert, that Timothy needs physical and occupational therapy but "that there is no likelihood that Timothy W. will acquire academic skills or be able to care for himself and does not have communication skills." (Pet. App. 52a.) The court then concluded that Timothy cannot benefit from education and that the "greatest service . . . that society can do for Timothy W. is to alleviate his pain(s) and suffering(s) and provide him with a comfortable and secure living environment." (Pet. App. 57a.)

On appeal, Timothy challenged both the legal and factual conclusions reached by the district court. Although the court of appeals' own analysis of the facts evidenced serious misgivings, if not disagreement, with the district court's factual findings, it found it unnecessary to overrule the court on that ground

(Pet. App. 9a). Instead, the court of appeals, after exhaustively reviewing the language of the EAHCA, its legislative history, and the relevant case law, correctly held that there was no requirement under the EAHCA, or the New Hampshire law implementing it, that a handicapped child demonstrate that he can benefit from special education in order to be eligible to receive that education (Pet. App. 38a).

In reaching that decision, the court of appeals was particularly impressed by the fact that the word "all" permeates the EAHCA, that Congress expressly stated that it intended to end the exclusion of handicapped children from education, and that the severely handicapped were given priority under the Act (Pet. App. 10a-11a). The court did not end its analysis there. The court also reviewed the legislative history of the EAHCA as well as post-enactment actions by Congress. As a result, the court concluded that Congress was "unequivocal at the time of passage of the Act in 1975, and it has been equally unequivocal during the intervening years." (Pet. App. 29a.) Finally, the court reviewed the few cases which have even considered the issue. Here again, however, the court found the mandate to be unmistakable; all handicapped children are entitled to a free appropriate public education (Pet. App. 38a-39a).

REASONS FOR DENYING WRIT.

In essence, Petitioner seeks in this case to return to the practice which was widespread prior to the enactment of the EAHCA: the exclusion from public education of some handicapped children who are thought to be too handicapped to benefit from education. Petitioner seeks to achieve this goal in two ways. First, Petitioner seeks to have this Court engraft upon the EAHCA words that appear nowhere in the legislation, words to the effect that a child shall not receive an education unless it can be shown that he or she will benefit from education. Second, Petitioner seeks to construct the definition of

special education in a way which would operate to effectively exclude certain severely handicapped children from receiving the education that most professionals agree can and should be provided.

Certiorari, however, is not warranted in this case. There is no conflict among the courts which have considered the issues raised by this case. In fact, courts have agreed that the EAHCA requires that all handicapped children, regardless of the severity of their handicap, be provided with a free appropriate public education and that, to accomplish that end, education must be defined broadly. No other interpretation is possible. The EAHCA, on its face and through its legislative history, is clear: *all* handicapped children are entitled to receive a free, appropriate public education which will meet their unique needs.

Even if the EAHCA were ambiguous or there were a split among the courts on the issues presented by this case, the issue regarding the scope of services to be provided to Timothy is not ripe. No dispute has arisen over what services he should receive; the dispute has centered on whether he is even eligible to receive services.

Finally, this case does not reach the requisite level of importance to justify certiorari because the issue so rarely arises, and it affects only a few states and a relatively small number of handicapped students.

I. THERE ARE NO CONFLICTS WHICH WARRANT THE GRANTING OF THE PETITION IN THIS CASE SINCE THE COURT DECISION IS CONSISTENT WITH THE DECISION OF OTHER APPEALS COURTS, THE PLAIN LANGUAGE OF THE EAHCA, ITS LEGISLATIVE HISTORY, AND THE DECISIONS OF THIS COURT.

A. *There is No Conflict Between the Decision of the Court Below and the Decisions of Any Other Federal or State Court of Appeals.*

To warrant full consideration by this Court on a petition for certiorari, Petitioner generally should show that there is a *direct* conflict between the court of appeals' decision and decisions of this Court, the courts of appeal of the other federal circuits or the highest appellate court of the affected state. See U.S. Sup. Ct. Rule 17.1(a); Stern and Gressman, *Supreme Court Practice*, 6th Ed., 1978. 196-212.

Notably absent from the Petitioner's arguments in favor of a grant of certiorari, is any assertion that there is a split among the circuits on the issues presented. That is because, as noted by the court of appeals, the decision of the district court is "the only court in the fourteen years subsequent to the passage of the Act, to hold that a handicapped child was not entitled to a public education under the Act because he could not benefit from the education." (Pet. App., 38a). Like the court of appeals in this case, virtually every court, in reviewing the mandate of the EAHCA has recognized that, "[t]he language and the legislative history of the Act simply do not entertain the possibility that some children may be untrainable." *Kruelle v. New Castle County School District*, 642 F.2d 687, 695 (3d Cir. 1981). Accord: *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983) ("Congress established a *priority* under the Act for the most severely retarded children, 20 U.S.C. § 1412(3), for many of whom, certainly, education will not

consist of a classroom training but rather training in very basic skills.”) (emphasis added); *Garrity v. Gallen*, 522 F.Supp. 171, 217 (D. N.H. 1981) (under EAHCA and Section 504 of the Rehabilitation Act of 1973, a state school “cannot . . . absolutely deny certain services to individuals without providing equivalent services . . . [p]rofoundly retarded resident must be offered [education and training] to the same extent as mildly retarded resident. . . .”); *Gladys J. v. Pearland Ind. School District*, 520 F.Supp. 869, 879 (S.D. Tex. 1981) (“The language and the legislative history of [the EAHCA] simply do not admit of the possibility that some children may be beyond the reach of our educational expertise.”) *Matthews v. Campbell*, 1979-1980 EHLR DEC. 551:264, 266 (E.D. Va. 1979) (“neither the language of the [EAHCA] nor the legislative history appears to contemplate [the] possibility [that a child may be ‘untrainable.’]”) ⁵ As the following section shows, courts could not have reached any other conclusion.

⁵ There is one court decision under the EAHCA which suggests, in *dicta*, the possibility of excluding some comatose handicapped children from education. *Parks v. Pavkovic*, 753 F.2d. 1397, 1405 (7th Cir. 1985). Aside from the fact that Timothy is not in a coma, the court’s discussion of the “hypothetical case” in *Parks* is scant authority indeed for ruling that the EAHCA requires demonstration of capacity to benefit as a precondition to eligibility for special education. The court in *Parks* was not confronted with issues presented here; nor did the court, as in the cases cited above, have the occasion to determine what was appropriate special education in a given case. The *Parks* case was a class action in which the court was confronted with the issue of whether the State of Illinois violated the EAHCA by requiring parents to pay costs related to their children’s institutionalization. Furthermore, it is unclear exactly how that court would rule if presented with the issues in this case. As the court stated:

With persons as severely retarded as Lester Parks the scope for education is extremely limited, but we do not understand the state to be arguing that Lester or the other members of the class are uneducable. Nor would such an argument be likely to succeed (See e.g. *Abrahamson v. Hershman*, *supra*, 701 F.2d at 228); 3-6 year olds are educable. The state might as well have said, we choose to classify as developmentally disabled those children whose only need is for special education.

Parks, 753 F.2d at 1406.

B. The Decision by the Court of Appeals is Faithful to the Plain Language of the EAHCA and the Mandate of Congress as Expressed in its Legislative History.

The plain language of the EAHCA is unequivocal in mandating education for all, and the court of appeals correctly interpreted and applied its provisions.⁶ In 1975, Congress, in the face of evidence which showed that there were more than eight million handicapped children in the United States whose educational needs were not being met and one million children — usually the most severely handicapped — who were receiving no education at all,⁷ enacted legislation to remedy this problem and entitled it “Education for *All* Handicapped Children Act of 1975.” Section 1 of Act, Nov. 29, 1975, P.L. 94-142, 89 Stat. 773 (emphasis added). The express purpose of the EAHCA is “to assure that *all* handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. § 1400(c) (emphasis added). The EAHCA points to the fact that “State and local educational agencies have a responsibility to provide education

⁶ The court of appeals also correctly interpreted and applied State law. While federal special education law provides a basic “floor of opportunity,” it also incorporates by reference the sometimes more generous state substantive law standards. *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985). In this case, regardless of whether the EAHCA is absolute in guaranteeing Timothy a free appropriate public education, New Hampshire R.S.A. 186-C is devoid of a “capacity to benefit” standard. As the State hearing officer found, New Hampshire’s special education law, R.S.A. 186-A:6, once contained a “capacity of being benefited from instruction” requirement which was repealed in 1978 (Pet. App. 61a). State law now declares that it is the policy “that *all* children in New Hampshire be provided with equal educational opportunities.” R.S.A. 186-C:1 (Pet. App. 182a) New Hampshire law, moreover, guarantees to “*all school-age children*” a quality education, “to the end that each such child shall be provided the opportunity to *reach his full educational potential* and shall have been exposed to the widest possible variety of educational and cultural experiences consistent with sound basic education.” R.S.A. 21-N:1(II)(c) (emphasis added).

⁷ H.R. Rep. No. 332, 44 Cong., 1st Sess. 2 at 7.

for *all* handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children." 20 U.S.C. § 1400(b)(8) (emphasis added). The EAHCA explicitly requires States to assure that a free appropriate public education will be available for "*all* handicapped children" of school age, "regardless of the severity of their handicap." 20 U.S.C. §§ 1412(1) and 1412(2)(C) (emphasis added). Significantly, in response to the widespread exclusion of children with severe handicaps, the EAHCA required that participating states "establish priorities for providing a free appropriate education to all handicapped children . . . first with respect to handicapped children who are not receiving an education, second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education." 20 U.S.C. § 1412(3).⁸

The legislative history of the EAHCA shows as clearly as does the express language of the Act that Congress intended that no handicapped child should be excluded on the basis of ineducability. Throughout the hearings, legislators specifically indicated that exclusion of handicapped children was an evil the legislation was intended to combat. Passage of the EAHCA was the culmination of Congressional efforts since 1966 to

⁸ In an attempt to avoid the implications of the fact that the phrase "capacity to benefit," is not to be found anywhere in the EAHCA, the Petitioner argues that the use of the word "need" in 20 U.S.C. § 1412(2)(C) is functionally equivalent to Congress expressly providing for a "capable of benefiting" eligibility standard in the EAHCA. The problem with this argument as it is posed (i.e. that the State may exclude from education altogether a child who does not need or cannot benefit from education) is that it is irreconcilable with other express provisions within the Act. For example, under 20 U.S.C. § 1412(1) the State must without qualification assure "all handicapped children the right to a free appropriate public education." A more logical way to view the use of the word "need," and one more consistent with language of the statute as a whole and its legislative history, is that the "need" requirement imposes an upper limit on who is eligible for *special* education, since not all handicapped children need *special* education in order to obtain a free appropriate public education. Some handicapped children are able to participate in regular education with their peers without the need for any *special* services.

address the national failure to provide handicapped children "educational opportunity that has been long considered the right of every other American child." 121 Cong. Rec. S 20427 (daily ed. Nov. 19, 1975) (remarks by Sen. Randolph). At hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard numerous witnesses, including, among others, parents, teachers, and special education professionals, testify that handicapped children were being excluded from school, denied necessary services, and subjected to educational neglect, in many cases because school officials contended they could not learn.⁹ As summarized by Senator Williams:

⁹ This type of testimony was prevalent throughout the legislative history of the EAHCA. See e.g., *Extension of Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcommittee on Select Education of the House of Representatives Committee on Education and Labor*, 94th Cong., 1st Sess. 40 (1975) (statement of Frederick J. Weintraub, Council for Exceptional Children) ("schools were contending that there were very severely handicapped children who 'could not learn, could not benefit from an education.' . . . All children are educable, even the most severely impaired child"); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings on H.R. 70 Before the Select Subcommittee on Education of the House of Representatives Committee on Education and Labor*, 93d Cong., 2d Sess. 221 (1974) (statement of Samuel Teitelman); *Education for All Handicapped Children, 1975: Hearings on S. 6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 94th Cong., 1st Sess. 227 (1975) (statement of Kate Long, Special Education Professional) ("Since it was generally assumed, with the best of intentions, that these retarded children couldn't learn anyhow, there was great resistance to spending money on the program"); *Education for All Handicapped Children, 1973-1974: Hearings on S. 6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 25, 97-98 (1973) (statement of Mildred Ricci) (son classified "ineducable or trainable retarded" and denied public education); *id.* at 99 (child excluded from public school as uneducable); *id.* at 346-347 (statement of David Bartley, Speaker, Massachusetts House of Representatives); *id.* at 394-395 (statement of Barbara Cutler, Past President, Association for Mentally Ill Children in Massachusetts); *id.* at 653-655 (statement of Dr. Dorothy Fleetwood, Director, Rehabilitation Services, Partlow State School and Hospital); *id.* at 658 (statement of Dr. Oliver L. Hurley, Associate Professor of Special Education, University of Georgia).

Exclusion from school, institutionalization, the lack of appropriate services to provide attention to the individual child's need — indeed, the denial of equal rights by a society which proclaims liberty and justice for all of its people — are echoes which the subcommittee has found throughout all of its hearings.¹⁰

Congress also took extensive testimony decrying the lack of programs for severely and profoundly handicapped children and insisting that *all* such children can benefit from education.¹¹

¹⁰ *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on The Handicapped of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. (1973-74) n. 2, at 1153.*

¹¹ See e.g. *Education for All Handicapped Children, 1974: Hearings on S. 6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 50 (1973) (statement of Robert Stearns) (legislation must include profoundly retarded because they, too, can benefit from education and have been most neglected); id. at 372 (statement of Professor Gunnar Dybwad, Brandeis University) ("It is indeed of the essence that all handicapped children without exception receive a free appropriate public education. Ten years ago such a proposal would have brought about the strongest protest . . . from many other professionals in the field of education, psychology, and child development. The situation today is totally different"); id. at 395 (statement of Barbara Cutler, Past President, Association for Mentally Ill Children in Massachusetts) ("Without the emphatic 'all handicapped children' these most seriously disturbed children will still go unserved"); id. at 430 (statement of Jean Garvin, Vermont State Director of Special Education); id. at 654-655 (statement of Dr. Dorothy Fleetwood Director, Habilitation Services, Partlow State School and Hospital) ("An extremely significant aspect of this bill is reflected in the word 'all.' Even our act 106 in Alabama, with which I am pleased, has an element of exclusion — it authorized services for all except the profoundly retarded. This aspect of Senate Bill 6, recognizes a profound point of education. Education is for all children and for handicapped children. What is taught may vary depending upon needs and capabilities, but all are taught"); id. at 1455 (statement of Dennis Haggerty, Esquire) ("That the mere classification of retarded-educable and retarded-trainable with assigned IQ's lead to the premise that all below those designated IQ's were RN — retarded nothing. Rather than the above, the presumption should have been — all persons are capable of some education — a zero reject principle"); *Extension of the Education of the Handicapped Act: Hearings on H.R. 7217 Before the Subcommittee on Select Education of the House of Representatives Committee on Education and Labor, 94th Cong., 1st Sess., 40 (statement of Frederick J. Weintraub, Council for Exceptional Children) ("All children are educable, even the most severely impaired child"); Financial Assistance for Improved**

Indeed, there is not a single suggestion in the legislative history that any child should be excluded from the coverage of the EAHCA because that child is too severely handicapped.¹²

As stressed by the court of appeals, in the fourteen years since its enactment, the EAHCA has been amended four times,¹³ and each of these amendments confirm that Congress has never wavered in its policy that each and every severely handicapped child be included, that no educability eligibility test be allowed, and that those children who, like Timothy, have the most severe handicaps, receive priority attention (Pet. App. 24a-29a). For example, in its most recent amendment to the EAHCA Congress focused especially on the needs and challenges of those children who are deaf-blind and multiply handicapped like Timothy, retaining and extending provisions for direct specialized, intensive professional and allied services to enable such children to achieve their potential. 14 U.S.C.

Educational Services for Handicapped Children: Hearings on H.R. 70 Before the Select Subcommittee on Education of the House of Representatives Committee on Education and Labor, 93d Cong., 2d Sess. 58 (1974) (statement of Rep. Ogden R. Reid, New York) ("We must commit ourselves to the notion that no child is incapable of being educated").

¹² This is not surprising. As the court noted in *Pennsylvania Assoc. for Retarded Citizens (PARC) v. Pennsylvania*, 343 F.Supp. 274 (E.D. Pa. 1971), one of the cases relied upon by Congress in passing the EAHCA:

Without exception, expert opinion indicates that:

[A]ll mentally retarded persons are capable of benefitting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency and the remaining few, with such education and training are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education.

PARC, 343 F. Supp. at 296.

¹³ Pub. L. 95-561, 92 Stat. 2364 (1978); Pub. L. 98-199, 97 Stat. 1357 (1983); Pub. L. 99-372, 100 Stat. 796 (1986); Pub. L. 99-457, 100 Stat. 1145 (1986).

§ 1422. In reaffirming its commitment, the Senate Committee explained:

The Committee recognizes deaf-blind children and youth as those who have concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for the deaf or blind children. . . . It is well known that the majority of the deaf-blind population is severely and multiply handicapped. Thus, many of these children and youth meet the eligibility requirements of more than one classification of handicapped.

By retaining current law the Committee recognizes the continued need for the resources . . . serving deaf-blind children and youth. As previously noted by this Committee in S. Rep. 98-191, these resources should be made available to certain severely, multiply handicapped children.

S. Rep. No. 99-315, 99th Cong. 2d Sess., at 12-13 (1986).

The basic premise of the Petitioner and the district court below — that “Congress would not legislate futility!” (Pet. App. 47a) — is therefore fundamentally flawed. Congress was not legislating futility, because it determined that all children could benefit from an appropriate education. In light of the fact that medical knowledge in this area is both uncertain and rapidly improving, it is not an exercise in futility for Congress to determine that school districts are obligated to *attempt*, at least, to benefit all its handicapped students. It is quite clear that no one knows with certainty what the result of a program will be for a particular child, and Congress determined that guesswork was not an appropriate exercise for its funding recipients. Accordingly, the statute passed by Congress was

not futile but quite reasonable, and the task of carving out any exceptions to it must be left to Congress.

C. There is No Conflict Between the Decision Below and the Decisions of This Court Interpreting the Education for All Handicapped Children Act.

Petitioner has not shown that there is a conflict between the decision below and the decisions of this Court. Petitioner can show no such conflict in this case because the decisions of this Court have repeatedly recognized that Congress' overriding concern in enacting the EAHCA was in ending the exclusion of handicapped children from education.

The court of appeals' opinion that the EAHCA may not be rewritten to exclude certain children from education because they are too severely handicapped (Pet. App. 37a-38a) was required by this Court's recent decision in *Honig v. Doe*, 484 U.S. 305 (1988). In *Honig* this Court was asked to consider whether the "stay put" requirement of the EAHCA, which mandates that a handicapped child remain in placement during the pending of an appeal, admits of a "dangerousness" exception. One of the plaintiffs had been expelled from a special education program because he had tried to strangle another student. The student's parents contested their child's expulsion and sought his continued placement in the program during their appeal.

This Court, in considering the rationale underlying the "stay put" provision, found that it was designed, along with several other provisions of the EAHCA, to attack state and local school districts' "exclusionary practices" which were rampant prior to the EAHCA. This Court thus found no justification for reading implied exceptions into the provision. As this Court remarked, "[t]he language of § 1415(e)(3) is unequivocal" (*Honig*, 486 U.S. at 323) and the statute "means what it says." *Id.* at 325. Since the omission of any exceptions was, in this Court's view, intentional, it was "therefore not at liberty to

engraft onto the statute an exception Congress chose not to create." *Id.*

This Court's decision in *Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984) also compels the conclusion of the court of appeals that all handicapped children are entitled to an education. In holding that clean intermittent catheterization was a related service under the EAHCA, this Court explained:

As we have stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned.

Tatro, 468 U.S. at 891.

Despite *Honig* and *Tatro*, Petitioner suggests in its petition for certiorari (see e.g., Petition at 12-13), that the First Circuit's decision is in conflict with this Court's holding in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Petitioners are wrong.

In *Rowley*, this Court faced the question of whether the EAHCA required the provision of a sign language interpreter for a deaf child who was receiving other assistance and was progressing easily from grade to grade. This Court stated that:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized

instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200. From this passage, Petitioner reasons that the EAHCA does not require special education where no benefit can be derived.

That deduction, however, cannot be fairly made from the quoted language, which was not written with the current issue in mind. As this Court recognized in *Rowley*, the requirements of the EAHCA were not established in a vacuum. Congress, in enacting the EAHCA, relied in large part on two landmark federal court cases challenging the practice of excluding groups of handicapped children from public education, a practice often justified by the claim of school officials that such children could not benefit from schooling. *Pennsylvania Assoc. for Retarded Citizens (PARC) v. Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1971), *aff'd and settlement approved*, 343 F.Supp. 274 (E.D. Pa. 1971), and *Mills v. Board of Education*, 348 F.Supp. 366 (D. D.C. 1972). The courts in *PARC* and *Mills* both held that "handicapped children may not be excluded entirely from public education." *Rowley*, 458 U.S. at 199.

Petitioner's deduction is inconsistent with the broader lesson of *Rowley* that school districts must provide access to a free, appropriate education quite irrespective of any particular degree of guaranteed success. There is not the slightest indication in that decision that the "basic floor of opportunity" guaranteed by the EAHCA contains, in the words of the First Circuit, "a trap door for the severely handicapped." (Pet. App. 36a.) As this Court has stated:

Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep. No. 94-168. . . . Thus, the intent of the Act

was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Rowley, supra at 192.

In sum, the decision of the court of appeals is faithful to the plain language of the EAHCA, is in keeping with the will of Congress as expressed in the legislative history of the Act, and is consistent with the decisions rendered under the Act, including the decisions of this Court. The Petition for Writ of Certiorari should, therefore, be denied.

II. THE PETITION, INsofar AS IT SEEKS REVIEW OF THE FIRST CIRCUIT'S OPINION THAT EDUCATION UNDER THE EAHCA IS BROADLY DEFINED TO INCLUDE THE PROVISION OF SUCH SERVICES AS PHYSICAL AND OCCUPATIONAL THERAPY TO PROFOUNDLY HANDICAPPED CHILDREN, SHOULD BE DENIED.

A. *The Issue of Whether Education Under the EAHCA is Broadly Defined to Include the Provision of Such Services as Physical and Occupational Therapy to Profoundly Handicapped Children is Not Ripe.*

The court of appeals, in its decision holding that all handicapped children are entitled to an education, pointed out that case law under the EAHCA overwhelmingly supports the view that education is broadly defined, and that the district court's focus on "traditional 'cognitive skills'" obviously led it astray (Pet. App. 33a-34a). Petitioner, in an effort to bolster its case that its petition should be granted, contends that the decision of the court of appeals erroneously "enlarged the scope of services that must be provided [under the EAHCA]." (Petition

at 16.) It is clear, however, that review of this aspect of the First Circuit's decision is not warranted.

First and foremost, review is not warranted because the issue as defined by the Petitioner is not ripe. Neither the district court nor the court of appeals held that the *only* services Timothy needs are services such as physical and occupational therapy. To the contrary, the court of appeals remanded the case, and ordered that the district court retain jurisdiction until a suitable Individualized Education Program (I.E.P.) is effectuated by the school district (Pet. App. 39a). The EAHCA requires that I.E.P.'s be developed at meetings with the participation of the child's parents. 34 C.F.R. § 300.344. A parent may request a hearing if dissatisfied with the I.E.P. 20 U.S.C. § 1416(b)(2).

The evidence suggests, moreover, that Timothy's program should not be limited to the provision of occupational and physical therapy. For example, Dr. William Schofield testified at the preliminary injunction hearing that Timothy needs such services as "occupational therapy, development of some kind of communication program, toileting program, certainly a feeding program, tactile stimulation, which may be the basis for that communication process over the long run." (App. I, 77.) Dr. Schofield's opinion was supported by Kathy Schwaninger who later reported that she viewed Timothy's special education needs as training to accomplish functional and practical skills development, and that such a program must be supported with related services of physical, occupational, and speech therapy (App. III, 747).

The need to integrate all aspects of Timothy's program was also stressed by a number of witnesses. For example, as Dr. Schofield stated:

The present transdisciplinary educational model utilizes therapists as trainers and evaluators of teacher implemented therapy programs. In this role the therapist trains classroom teachers and aides and parents to utilize therapeutic techniques within the entire

spectrum of instructional services. Thus the student benefits from correct and appropriate positioning and handling through the day. This means that something as seemingly simple as moving from one place in the classroom to another can become a major part of the educational program for a student with severe motor problems. It is imperative to emphasize that such therapy has a genuine instructional role. What can be learned from these seemingly innocuous exercises is: body control, self expression, self determination, directionality, ambulation, spatial concepts as well as the obvious physical, muscular benefit derived.

(App. VI, 1360-1369.)

This approach to services for severely and profoundly handicapped children is entirely consistent with case law under the EAHCA. Thus, as stated by the court in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181 (3d Cir. 1988), related services for severely and profoundly handicapped persons serve a dual function.

First, because these children have extensive physical difficulties that often interfere with development in other areas, physical therapy is an essential prerequisite to education. For example, development of motor abilities is often the first step in overall educational development. See P.H. Pearson & C.E. Williams, eds., *Physical Therapy Services in the Developmental Disabilities* 173 . . . (noting close relationship between speech and head, trunk, and arm control).

Second, the physical therapy itself may form the core of a severely disabled child's special education. This court has recognized that "[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child . . . is very differ-

ent from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy" *DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir. 1984). In Christopher's case, physical therapy is not merely a conduit to his education but constitutes, in and of itself, a major portion of his special education, teaching him basic skills such as toileting, feeding, ambulation, etc.

This is, therefore, not a case like *Rowley* and *Tatro* where the lines were clearly drawn over what services should be provided. Indeed, the issue for Timothy for the last eleven years has not been whether Timothy should receive this or that service, or how much of this or that service he should receive, but whether he should receive *any* services at all from the school district. In short, until the school district has had an opportunity to comply with the First Circuit's order, and convene the meetings to develop an I.E.P. as required by 34 C.F.R. §§ 300.341-300.346, it is impossible to say whether the language of the court's decision regarding the breadth of services under the EAHCA will create a controversy in this case.

B. Under the EAHCA Education is Broadly Defined to Include the Provision of Such Services as Physical and Occupational Therapy to Profoundly Handicapped Children.

In any case, should this Court reach this issue, there is nothing in the EAHCA which requires "related services" and "special education" to be treated as "separate and distinct" categories of service in every instance as claimed by Petitioner. Petition at 16. Although a number of services are specifically listed, including physical and occupational therapy, and are labelled as "related services," the comments to the regulations make it clear that the list "is not exhaustive and may include

other developmental, corrective, or supportive services . . . if they are required to assist a handicapped child to benefit from special education. Comment to 34 C.F.R. § 300.13. The statute and regulations also provide that "the term [special education] includes speech pathology, *or any other related service*, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered 'special education' rather than a 'related service' under State standards." 34 C.F.R. § 300.14(a)(2) (emphasis added). Under New Hampshire regulations a service is "special education" if it is "team designed instruction," meets "the unique needs of an educationally handicapped child," and is based on the "Individualized Education Program." New Hampshire Standards Ed. 1101.24

Given the wide variety of children served by the EAHCA, and the fact that services must be designed to meet the unique needs of the handicapped child, it is not surprising that the EAHCA takes a flexible approach. As this Court pointed out in *Rowley*:

The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Rowley, 458 U.S. at 202.

As illustrated by Timothy's more than ten year struggle to receive a free appropriate public education, the rigid distinction between special education and related services suggested by Petitioner would, contrary to the express purpose of the EAHCA, effectively foreclose education to many profoundly handicapped children. Profoundly retarded individuals have been defined:

as those persons who function at the extreme lower levels of cognitive attainment and adaptive behavior and who exhibit at least several of the following primary characteristics:

1. They have not acquired basic self-care skills.
2. They are permanently non-ambulatory.
3. They are not known to many of the normal residents of their communities.
4. They do not attend public schools unless the law explicitly requires their enrollment.
5. They would have survived only a short time a few generations ago but now have a life expectancy of decades due to modern medical intervention.
6. They have been considered to be "untrainable" or "custodial" cases until recently.
7. They show extremely little promise of becoming creative, productive citizens even with the most heroic efforts of today's most skilled behavior therapists.

Educational Rights of Severely and Profoundly Handicapped Children, 61 Neb. L. Rev. 586, 587 (1982) citing *Symposium on Educating the Severely and Profoundly Handicapped*, 1, *Analysis and Intervention in Developmental Disabilities*.

In other words, the "cognitive ability" of profoundly retarded children is open to serious question, and their ability to acquire academic skills or be able to care for themselves is often non-existent. It is also more common than not that a profoundly

retarded child is unable to communicate. These facts regarding profoundly retarded children like Timothy should not serve, however, to exclude them from education under the EAHCA.

This point was driven home in *Battle v. Armstrong*, 629 F.2d 269 (3d Cir. 1980) *cert. denied* 452 U.S. 968 (1981). In that case, the Third Circuit affirmed a district court decision striking down a Pennsylvania policy of limiting the provision of education to severely and profoundly handicapped students to a period of 180 days. In reaching its decision the court discussed the requirement that special education meet the unique needs of severely handicapped children:

The statutory goal to provide a "free appropriate education" must be viewed as one establishing the direction toward which the programs required by the statute should aim. To define that direction for the handicapped as one leading toward self-sufficiency is merely to acknowledge the obvious — that the severely and profoundly handicapped children in the plaintiff class do not possess substantial learning capacity along objective academic lines and therefore must be assisted in achieving the realistic educational objective available to them, that of reasonable self-sufficiency under their individual circumstances.

Battle, 629 F.2d at 286.

Finally, it must be stressed that Petitioner has not pointed to any decision which has rejected the approach taken by the court of appeals in this case, or the other courts cited in the court's opinion (Pet. App. 33a-34a), regarding the scope of education available under the EAHCA for severely and profoundly handicapped children. Additionally, Petitioner has not pointed to any authority which supports the view that this Court's intervention is required to relieve the alleged "pressure on school districts to cover the costs of all services needed by a handicapped child. . . ." (Petition at 18). All of the decisions

cited by Petitioner to demonstrate this point merely suggest that disputes in individual cases about whether a particular service is a related service covered by the EAHCA are inevitable when the statute in question guarantees the service when "appropriate". See *Rowley*, 458 U.S. at 195.

III. THE QUESTION PRESENTED DOES NOT WARRANT A GRANT OF CERTIORARI BECAUSE OF THE LIMITED IMPORTANCE OF THE ISSUE.

The grant of a writ of certiorari is purely discretionary, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), and is only granted when important issues of federal law are presented which warrant resolution by this Court. Rule 17, U.S. Sup. Ct. Rules. See *U.S. v. Oregon*, 366 U.S. 643, 645 (1961); *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 499 (1956); *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955). The issues presented by Petitioner do not rise to the requisite level of importance because of the limited impact of this issue on States and school districts around the country and the small numbers of handicapped children affected.

A. *The Decision Below Affects Only a Few States and School Districts.*

Contrary to the claim by Petitioner the issue of excluding severely handicapped children from education is not a recurring one. In the fourteen years since the enactment of the EAHCA there has been very little litigation over the issue of whether certain profoundly handicapped students should be excluded from education. There are no other federal or state court decisions on this issue. Furthermore, in reviewing the hundreds of reported administrative decisions over those years, this issue has arisen in

only seven states, with hearing officers in four of those states deciding that the word "All" in the EAHCA means what it says.¹⁴

There is good reason for this. As the testimony before Congress indicated great strides have been made in educating profoundly retarded individuals and further strides can be expected. *Supra* at n.14. Most states and school districts, therefore, as a matter of both morality and sound educational policy, have assumed the responsibility of educating all handicapped children.¹⁵

¹⁴ There have been only a total of eleven reported administrative decisions, including the decision in this case, dealing directly with the issue of exclusion based upon ineducability in the 14 years since the enactment of the EAHCA; four of those cases were in New Hampshire. See *Christopher C. v. Weston Pub. Schools*, 1987-88 EHLR 509:154; *Nashua School District v. James O.*, (N.H. 1986) (App. VII, 1472); *contra Costa County Consortium*, (Case No. SE-85401), 1985-86 EHLR 507:330 (Cal. 1985); *Case No. SE 53-81*, EHLR 506:239 (Ill. 1984); *School District of the Menomonee Area v. Rachel W.*, 1983-84 EHLR 505:220 (1983); *In re Keith J.*, 3 EHLR 502:271 (Ga. 1981); *Case No. 10571*, EHLR 502:315 (N.Y. 1981); *X v. Laconia School District* (N.H. 1981) App. VII, 1473; and *Christine L. v. Milan School District* (N.H. 1981) (App. VII, 1480) rev'd. by State Bd. of Ed. (1982) (App. VII, 1496). Petitioner's characterization of those administrative decisions ruling in favor of exclusion as expressing the "majority view" (Petition at 8-9 n.8) is puzzling, at best. Petitioner fails to mention that one of those decisions, *Christine L. v. Milan School District*, was reversed by the New Hampshire Board of Education on the grounds that an "ability to benefit" provision in state law had been repealed, and that Christine L. was "a citizen of the state, of school age, and handicapped to such an extent that her handicapping conditions interfere with her ability to learn." (App. VII, 1499.) Petitioner also fails to mention that the hearing officer in all the New Hampshire cases, except this one, was the same person.

¹⁵ Petitioner has raised the specter of enormous costs being imposed upon school districts and States. This assertion, as it applies to this case, is speculative. Timothy has never requested expensive services; he has only tried to get in the school house door and receive a special education program. In fact, while it is true that Timothy is placed in a program which costs about \$15,000 a year (App. IV, 1066-1067), that is only by default. The school district never offered or made available anything else (App. IV, 1046-1050; App. VI, 1288-1289).

B. *The Decision Below Affects Only a Few Students.*

Because the district court's decision was so imprecise, it is impossible to say with any certainty how many handicapped students would have been affected had it not been reversed. Assuming, however, that only profoundly handicapped students would be susceptible to the standard articulated by that court, it is still clear that there are relatively few children involved, and only then if other states choose to follow the exclusionary practices of some New Hampshire school districts. According to the *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III), published by the American Psychiatric Association, only 1% of the population are mentally retarded, and of the mentally retarded, only 1% are profoundly mentally retarded¹ (App. VII, 1385-1386). According to Petitioner, moreover, only about three or four thousand children are involved. Petition at 9 n.9.

Of course, from Timothy's point of view, if only one profoundly handicapped child were excluded from education, that would be too many. From a national perspective, however, the fact a few school districts around the country may have to serve some children they would rather not serve is not of sufficient importance to warrant the granting of the petition in this case.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS MOTHER AND
NEXT FRIEND, CYNTHIA W.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF THE NATIONAL LEAGUE OF CITIES,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
NATIONAL ASSOCIATION OF COUNTIES, AND
INTERNATIONAL CITY MANAGEMENT ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-515

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS MOTHER AND
NEXT FRIEND, CYNTHIA W.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE
NATIONAL LEAGUE OF CITIES,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
NATIONAL ASSOCIATION OF COUNTIES, AND
INTERNATIONAL CITY MANAGEMENT ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 36.1 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. Respondent has denied consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments.

The decision of the United States Court of Appeals for the First Circuit in *Timothy W. v. Rochester, New Hampshire, School District*, 875 F.2d 954 (1st Cir. 1989), alters the constitutional balance between the States and the federal government. The court of appeals' interpretation of the Education of the Handicapped Act (the "EHA" or the "Act"), 20 U.S.C. § 1400 *et seq.*, would require school districts to allocate substantial educational resources to children whose handicaps are so severe that they cannot benefit from such educational expenditures, thereby reducing the resources available for children who can so benefit.

Currently, all fifty States and the District of Columbia receive funding assistance under the EHA. United States Dept. of Education, *Ninth Annual Report to Congress on Implementation of Education of the Handicapped Act* (1987). Enacted in 1975, the Act sought to improve educational opportunities for handicapped children by providing federal funding to relieve the fiscal burden faced by States and local education authorities in educating handicapped children and by establishing substantive and procedural rules governing the provision of such special educational services.

The vast majority of funds needed to fulfill the statute's requirements, however, is paid by state governments and local school districts. Although the Act authorized increasing federal appropriations—ultimately to provide approximately twenty percent of the average cost of special education for handicapped students¹—the actual pro-

¹ The Act provided for appropriations reaching, by 1982, forty percent of the average per pupil expenditure for all students in public elementary and secondary schools in the United States. 20

portion of federal funding reached only 6.5 percent by 1981 (Pittenger & Kuriloff, *Educating the Handicapped: Reforming a Radical Law*, 66 Pub. Interest 72, 87 (Winter 1981)).

The First Circuit's ruling in this case would force States and local school districts to bear additionally the severe financial burden of providing costly educational services to children who, unfortunately, are incapable of benefitting from such services. In the instant case, the federal government funds only two percent of the costs of respondent's care.² As representatives of state and local government participants under the EHA, *amici* are gravely concerned by the First Circuit's imposition of a new and substantial financial obligation that is both unwarranted by the purposes of the EHA and vastly disproportionate to the financial assistance conferred under the Act.

The holding below also would require school districts to divert scarce funds away from educational services to those students, handicapped and nonhandicapped, who are able to benefit from such resources to care that is essentially medical and custodial for children who cannot benefit from educational services. The desire to provide services to children like Timothy W. and their families

U.S.C. § 1411(a)(1)(B)(v). Since the average cost of special education is about twice (and for children like Timothy W., many more times) the cost for education of nonhandicapped students (United States Dept. of Education, *Eleventh Annual Report to Congress on Implementation of Education of the Handicapped Act* 146, Table 52 (1989)), the proportion of expenditures for handicapped student education that the Act would have provided, even if fully funded, is approximately half the percentage provided in the statute, or twenty percent.

² Of approximately \$15,000 presently expended for services for Timothy, the federal government pays only \$300, leaving the balance of the burden to be borne by the State of New Hampshire and the Rochester School District. See Appendix I to petitioner's brief in the court below, at 132.

is surely understandable. But any such program must be carefully assessed—and funded by federal and state legislatures, not imposed on the States by a federal court's expansion of a federal statute long after the States made their decisions whether to accept the limited federal funding and the attached conditions.

Public education is near crisis, as school boards confront ever more constrained funding in the face of demands for improved student performance. See, e.g., National Governors' Association, *Time for Results: The Governors' 1991 Report on Education* 5 (1986) (United States eighth grade students rank ninth in math skills among twelve major industrialized nations; one-third of college freshmen read below seventh grade level; and American teenagers' math and science abilities, on average, declined between 1971 and 1982).³ *Amici* fear that the decision below will force school districts to reduce funding for all other students and therefore to compromise the quality of education for their educable young by divesting state and local government education authorities of their traditional control over the allocation of scarce educational funding. The First Circuit's decision threatens to throw askew the delicate balance of federal-state relations in an area of historical local concern.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and because *amici*'s perspective may help illuminate the significant and troubling federalism implications of the

³ In a recent speech to the Governors' Education Summit at the University of Virginia, President Bush, vowing to release state and local educational initiatives from the grip of restrictive federal regulation, warned of the potential dangers facing this country in its educational system: "No modern nation can long afford to allow so many of its sons and daughters to emerge into adulthood ignorant and unskilled. The status quo is a guarantee of mediocrity, social decay and national decline." The White House, Office of the Press Secretary, Charlottesville, Virginia, Remarks by the President during University Convocation (Sept. 28, 1989).

court of appeals' decision, *amici* respectfully move for leave to file the attached brief in support of petitioner.

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QUESTIONS PRESENTED

1. Whether Congress must unambiguously express its intent as to conditions imposing severe financial obligations upon state and local government recipients under a federal grant statute.

2. Whether Congress has, in enacting the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, unambiguously expressed its intent to impose financial burdens that far exceed the federal funds provided and that will produce no educational benefits.

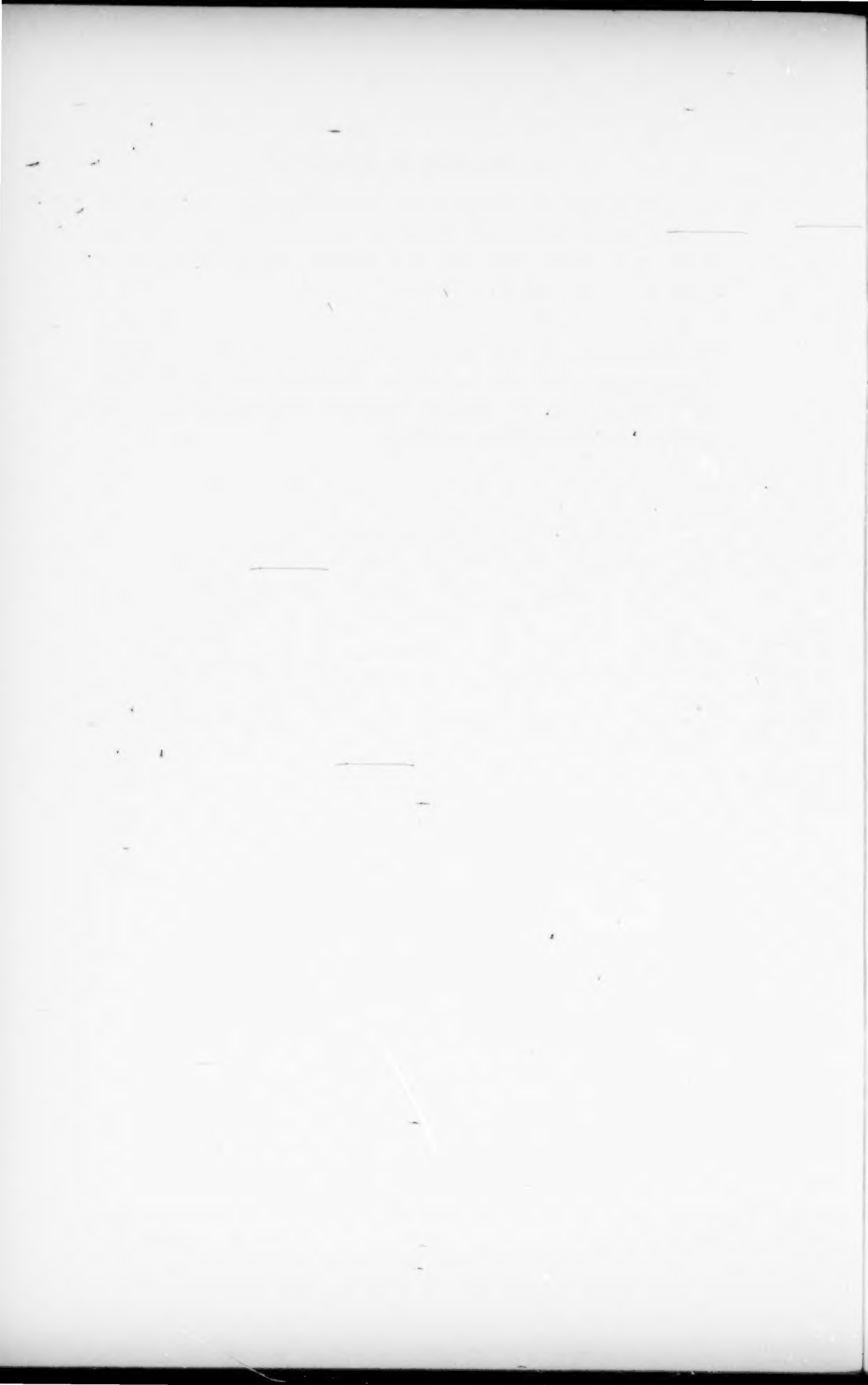


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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

Respondent Timothy W. is a thirteen-year-old child with extensive mental and physical disabilities. Severe respiratory and brain disorders have resulted in extreme brain damage, leaving Timothy with "virtually no cortical tissue." App. II, 188.¹ Timothy's doctors concluded that he "has no potential for development of self-care functions and has no educational potential." App. IV, 762. "[A]ll but the bottom of [his] brain ha[s] been destroyed by the hydrocephalus. Timmy functions as a reflex individual." App. IV, 784. These professional opinions were the basis of petitioner's conclusion in early 1980 that Timothy had no learning capacity and that he was therefore ineligible for educational services under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, a federal-state grant program in which New Hampshire participates. Despite Timothy's continued receipt of medical care and physical therapy pursuant to the Supplemental Security Income Program of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, Timothy's mother applied for special education services for her son. She refused a comprehensive evaluation of Timothy to determine whether his condition had improved since his last evaluation in 1980, and, absent information contradicting its earlier findings, petitioner concluded that Timothy was ineligible for educational services under the EHA.

Timothy's mother filed this lawsuit on his behalf seeking injunctive relief and \$175,000 in damages. The district court denied a motion for a preliminary injunction and abstained until Timothy exhausted all administrative remedies under the EHA. Subsequently, Timothy received numerous educational assessments and diagnostic tests, all of which confirmed that he is incapable of any meaningful learning. For example, a specialist in pediatric

¹ App. cites are to the appendix filed with the brief of petitioner, as appellee, in the court of appeals.

neurology concluded that Timothy's "potential for learning with such a degree of central nervous system damage is practically nonexistent." App. IV, 1031; see App. II, 192-96; App. IV, 900, 1028-30, 1053.

The state administrative hearing officer, construing federal requirements under the EHA, held that Timothy qualified for educational services under the Act and its state counterpart, N.H. Rev. Stat. Ann. § 186-C (Supp. 1988). The hearing officer based his decision on an interpretation of federal law, concluding that all handicapped children, regardless of whether they are "capable of benefiting from special education," must be provided with such services. Pet. App. 60a. Petitioner challenged the decision by filing a counterclaim in Timothy's lawsuit.

The district court granted summary judgment for petitioner, holding that the EHA does not require States to provide an education to children who cannot benefit from it. The court relied on this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), concluding that "Congress would not legislate futility!" Pet. App. 47a.

The court of appeals reversed and held that the district court had misinterpreted the EHA. The court of appeals based its holding primarily on the fact that the EHA is "permeated with the words 'all handicapped children' whenever it refers to the target population." Pet. App. 12a (emphasis in original). The court of appeals did not overturn the lower court's factual determination that respondent possesses no capacity for meaningful learning.

ARGUMENT

I. CONGRESS DID NOT UNAMBIGUOUSLY STATE ITS INTENT TO FORCE UPON LOCAL SCHOOL DISTRICTS FINANCIAL BURDENS THAT FAR EXCEED THE FEDERAL FUNDS PROVIDED AND PRODUCE NO EDUCATIONAL BENEFITS.

Congress indisputably "may fix the terms on which it shall disburse federal money to the States." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"). Nonetheless, when Congress enacts legislation pursuant to its spending power, if it "intends to impose a condition on the grant of federal moneys, it must do so unambiguously."² *Id.* (footnote omitted). Holding that a conditional grant statute like the EHA is "much in the nature of a contract[,] " the Court there admonished Congress to speak with a sufficiently "clear voice[] t[o] enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.*

² This Court has not previously determined whether the EHA was enacted pursuant to Congress's authority under Section 5 of the Fourteenth Amendment or under the Spending Clause, U.S. Const., Art. I, § 8. Most recently, in *Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 n.1 (1989), the Court expressly declined to decide the issue, inasmuch as petitioner there conceded that the EHA was enacted under Congress's Fourteenth Amendment powers. An earlier decision of this Court, however, strongly suggests that Congress derived its authority for the Act from its spending power. *Board of Education v. Rowley*, 458 U.S. 176, 204 n.26 (1982). *Amici* here assume that the EHA was enacted pursuant to Congress's spending power. This Court established in *Pennhurst I* that the Court would be especially circumspect in inferring congressional intent to wield its Fourteenth Amendment authority. "The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst I*, 451 U.S. at 16-17 (emphasis in original).

In *Pennhurst I*, this Court found that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, imposed no affirmative obligations on state recipients. The Court based its decision in part on the clear disparity between the “woefully inadequate” federal funds provided and the “enormous financial burden” that such obligations would have imposed. 451 U.S. at 24. This Court has found that Congress did impose on participating States certain affirmative obligations to provide appropriate educational services to handicapped students. *Rowley*, 458 U.S. at 183; *Honig v. Doe*, 108 S. Ct. 592, 597 (1988). While school district recipients have assumed such obligations, the First Circuit’s application of the EHA would grossly distort the financial burden for special education borne by local governments relative to the funds provided under the federal grants. “When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. It defies common sense, in short, to suppose that Congress implicitly imposed this massive obligation on participating States.” *Pennhurst I*, 451 U.S. at 24 (citation omitted). The overwhelming disparity between burdens and benefits here suggests application of the most exacting scrutiny to find that Congress could have intended, and that the States knowingly and voluntarily could have accepted, the imposition of such obligations.

The clear intent of Congress in enacting the EHA was “to assist States and localities to provide for the education of all handicapped children.” 20 U.S.C. § 1400(c). Congress expressly found that if they were “given appropriate funding,” state and local government educational agencies would provide effective special education to handicapped children but that “present financial resources [were] inadequate” and that “it [was] in the national interest that the Federal Government assist State and

local efforts to provide programs to meet the educational needs of handicapped children." 20 U.S.C. § 1400(b)(7)-(9).

Not only does the First Circuit's interpretation of the EHA defy the clear intent of Congress, as manifested by the statement of the Act's goals and findings, but the court below ignored cautionary language of this Court to regard a grant statute like the one at bar "'as a co-operative program of shared responsibilit[ies], not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund.'" *Pennhurst I*, 451 U.S. at 22 (quoting *Harris v. McRae*, 448 U.S. 297, 309 (1980)).

The First Circuit also devotes considerable space to an examination of legislative history of the EHA and subsequent amendments to it. Pet. App. 16a-29a. Just last Term, in *Dellmuth*, the Court held that the statutory language of the EHA did not evince a clear congressional intention to abrogate the States' Eleventh Amendment immunity from suit. The Court also stated that the rule of statutory construction applied in Eleventh Amendment cases like *Dellmuth* applies in other contexts as well. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2308 (1989).³ As the Court admonished: "[i]f Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile." *Dellmuth*, 109 S. Ct. at 2401.

Furthermore, the First Circuit's reliance on the legislative history of the amendments to the EHA (Pet. App. 24a-29a) is particularly misplaced because the court mis-

³ The Court cited *Pennhurst I*, 451 U.S. at 16, and *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), both involving interpretation of federal statutes that impose conditions on the grant of federal moneys.

interprets the clear import of the amendments themselves. In amending the Act in 1977 and again in 1983, Congress clearly contemplated the possibility of cases like the one at bar, in which the severity of children's handicaps, combined with inadequacy of knowledge, technology, and financial resources at the state and local level, would create an impossible burden for local school districts. Therefore, Congress authorized the appropriation of federal money expressly for the purpose of shouldering the tremendous financial burden of advancing learning and technology to permit the States to help "even the most severely handicapped child[ren] [to] be made less dependent through education." Pet. App. 28a (quoting 132 Cong. Rec. S7038 (1986) (remarks of Sen. Stafford)). See 20 U.S.C. §§ 1421-24 (establishing federal grant authorization for special resource centers and research projects to reach the special needs of severely handicapped children).

Congress's creation of separate grant programs to fund leading edge research into methods for educating children like Timothy, who, because of the severity of their handicaps and the state of the science, are presently uneducable, clearly indicates *both* that Congress did not intend to require States to exhaust scarce education dollars in providing services to the uneducable *and* that Congress intended to bear the burden of developing educational knowledge and technology in these areas where benefits presently are overwhelmed by costs.

In sum, given the substantial financial burdens that the First Circuit's application of the EHA would impose upon petitioner and other state and local governments represented by *amici*, compared with the modest federal funds provided under the Act, this Court should grant the petition for a writ of certiorari to determine the propriety of the First Circuit's interpretation of the EHA in light of the precedents established by this Court.

II. CONGRESS DID NOT UNAMBIGUOUSLY STATE ITS INTENT TO ABROGATE THE STATES' TRADITIONAL AUTHORITY OVER EDUCATIONAL POLICY.

Since the early days of this Republic, public education has been regarded primarily as the means by which a democratic society invests in the preservation of self-government. See, *e.g.*, N. Webster, "On the Education of Youth in America" (1790), in *Essays On Education In The Early Republic* 64 (F. Rudolph ed. 1965). The same is no less true today, as one modern political philosopher observes: "Education, in a great measure, forms the moral character of citizens, and moral character along with laws and institutions forms the basis of democratic government." A. Gutmann, *Democratic Education* 49 (1987).

Congress expressly recognized this in enacting the EHA by acknowledging that public education

is vital to secure the future and the prosperity of our people

With proper education services, many [handicapped children] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975).

In this case, there is, unfortunately, no realistic hope that Timothy W. and others situated similarly to him would ever "reduc[e] their dependence on society," much less "become productive citizens" in accordance with the purposes of the EHA. This is not to say that a just society does not provide for its unfortunate citizens. On the contrary, here ample medical services are available to respondent under a comprehensive state statute that affords care to the developmentally disabled. N.H. Stat.

Ann. § 171-A (Supp. 1988). But, when and where society does so care for its unfortunates, we properly do not refer to such care as "education," and we do not burden an educational system already laboring under one essential task with the additional obligation of providing for that costly care.

Education has been regarded traditionally as a governmental function of uniquely local concern. This Court has previously held that the "most persistent and difficult questions of educational policy" should be left to the "informed judgments made at the state and local levels." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973). In fact, the Court there ascribed particular significance to the principle that local school districts should retain "a large measure of authority as to how available funds will be allocated." *Id.* at 51.⁴ The provisions of the EHA are not, and should not be read, to the contrary. The Act provides that the recipient States and their local education agencies should have primary responsibility for the administration of "all educational programs for handicapped children within the State[.]" 20 U.S.C. § 1412(6).

Amici are concerned that the interpretation of the First Circuit in this case would do substantial violence to the deference properly accorded local educational authorities both by the precedents of this Court and by the express terms of the EHA. The Court should grant the petition to restore the proper balance under the federal program.

⁴ In a speech to the 1989 Governors' Education Summit (see attached Motion for Leave to File Brief, n.3), President Bush promised the assembled Governors that he would "work with [them] to loosen the grip of federal restrictions. How many great ideas, how many grand and noble experiments, have been impaled on the spike of a federal directive? Unnecessary restriction is the enemy of the bold. And bold action is what we need most of all."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ASSOCIATION AND THE AMERICAN ASSOCIATION
OF SCHOOL ADMINISTRATORS IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI

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SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

All public school districts receive or are eligible to receive funding under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (EAHCA).

The American Association of School Administrators (AASA) is the national

professional organization for local school district administrators and other educators in our nation's public schools. AASA's members include more than 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies.

Public school administrators are required to implement programs under the EAHCA and related state statutes. Administrators are concerned with implementing educational programs in a manner that is of benefit to all students -- both those who qualify for federal support under EAHCA and those who are in the regular instructional program.

The potential impact of the First

Circuit Court of Appeals decision, if followed as precedent by other jurisdictions, is much broader than the consequences it has for the parties involved. It could affect the expenditure of educational funds in every school district that receives federal monies under the EAHCA. NSBA and AASA as national educational organizations, have a strong interest in and unique perspective on the issues presented by this case. Petitioner has consented to the filing of this brief. Therefore, Amici request this Court to grant them leave to file the attached brief.

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No. 89-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Rochester, New Hampshire, School
District,

Petitioner

v.

Timothy W., by and through his Mother and
Next Friend, Cynthia W.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF AMICI CURIAE OF
THE NATIONAL SCHOOL BOARDS
ASSOCIATION
AND THE AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS
IN SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI

INTEREST OF THE AMICI CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

All public school districts receive or are eligible to receive funding under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (EAHCA).

The American Association of School Administrators (AASA) is the national

professional organization for local school district administrators and other educators in our nation's public schools. AASA's members include more than 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies.

Public school administrators are required to implement programs under the EAHCA and related state statutes. Administrators are concerned with implementing educational programs in a manner that is of benefit to all students -- both those who qualify for federal support under EAHCA and those who are in the regular instructional program.

STATEMENT OF THE CASE

Amici incorporate by reference the statement of the case in Petitioner's brief herein.

REASONS FOR GRANTING THIS WRIT

1. The court of appeals has expanded the coverage of the EAHCA beyond that indicated in the plain language of the statute.

2. The court of appeals erred by adopting its own factual findings without ruling that the district court's findings were "clearly erroneous."

3. In failing to distinguish between "special education" and "related services," the court of appeals ignored this Court's interpretation of these terms and set precedent that may result in a substantial increase in the cost of serving handicapped students.

ARGUMENT

1. The court of appeals has expanded the coverage of the EAHCA beyond that indicated in the plain language of the statute.

The Education for All Handicapped Children Act is neither a civil rights statute nor a public welfare statute designed to assure that the basic health and social needs of children are met. It is an education funding statute and the obligations set out in the Act and the substantive rights conferred under the Act, are all part of the funding conditions relating to the provision of educational services. As shall be demonstrated, the plain language of the Act does not support the position that the Act precludes consideration of a child's capacity to benefit from education in determining whether a school must provide services under the EAHCA.

The court of appeals decision is replete with references from the congressional committee reports and floor debate on the EAHCA to the use of the phrase "all handicapped children." Under the court of appeals' analysis, "the plain meaning" of the statute is to require the provision of services to all handicapped children. What the court fails to recognize is that the plain language of the Act also defines "handicapped children," and therefore the word "all" refers only to those handicapped children that fit within the definition.

Section 1401(1) of the Act defines the term "handicapped children":

mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with

specific learning
disabilities, who by reason
thereof require special
education and related
services. (Emphasis
supplied).

By definition then, some handicapped children are not covered by the Act. There are disabled children on both ends of the spectrum who do not "require special education" and, therefore, who are not considered to be "handicapped children" under the EAHCA. On one end of the spectrum are those children who are disabled in some way or have a history of, or are regarded as having, a disability but do not require special education because they are capable of participating in the regular education program without it.

Such children may be protected by Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination

against any "otherwise qualified handicapped individual" in federally assisted programs and activities, including school districts. "Handicapped individual" for purposes of Section 504 is defined as:

[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(7).

Thus, a child could be a "handicapped individual" under the Section 504 definition and not be a "handicapped child" under the EAHCA. A simple example might be a child with a history of a communicable disease such as tuberculosis. Although such a child meets the Section 504 definition, Nassau County v. Arline,

106 S.Ct. 1123 (1987), the child would not be covered by the EAHCA unless he or she "requires special education and related services."

On the other end of the spectrum is the child who requires no special education because the child has no capacity to benefit from it. A disabled child "requires" special education only if there is some educational goal which the child can reasonably be expected to meet, however limited that goal may be. If there is no goal that can reasonably be achieved, the child does not fall within the EAHCA definition, and the district has no obligation to provide services under the Act.

Congress cited as a basis for the EAHCA the orders in the landmark cases of Mills v. Board of Education of the

District of Columbia, 348 F.Supp. 866 (D.D.C. 1972), and Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1972), in order to assist school districts in funding education programs for these children with the goal of achieving "self sufficiency" or "some degree of self care." Id. at 1259. Nothing in these cases or the words of the statute precludes a trier-of-fact from making the determination that a particular child does not "require special education" because there is no reasonable educational goal which he or she is capable of meeting. The district court found that Timothy W. was incapable of either achieving self sufficiency or any degree of self

care.

Recently Lynn Miller, a physical and occupational therapist and one of the witnesses for Timothy W., wrote a letter to the New York Times concerning this case. (At the time this brief was filed, the letter had not been published by the Times. A copy of the letter is included in Appendix A.) The letter addresses a crucial question in this case -- what is "education?"

August 6, 1989

To the Editor:

Recently the Times published an article regarding the United States Court of Appeals decision that all children must be educated by their public school districts no matter how severe their disability or whether they can show any benefit.

The article described therapists testifying in 1984 that the child (Timothy W.) 'could hear, see bright lights

and respond to music, touching and talking'. I was one of those therapists.

I've changed my mind. I would not testify for him now. It is not what I said at the time that I would change for it is still an accurate statement. Timothy W. can still hear sound, see bright lights and respond to touch. That is all he could do then, and that is all he can do now, even after five years of daily exposure to teachers, therapists and special education programs.

What I now strongly believe is that the ability to respond to basic sensations does not indicate that learning can take place.

The POTENTIAL FOR CHANGE is what is important to determine when recommending that a child receive educational services. This means that the child must have sufficient mental or physical abilities to learn something new. There can be no Individualized Educational Plan for anyone incapable of learning. What is impossible cannot be mandated.

As the article accurately pointed out, it may sometimes be difficult to prove who will thrive and who will not. The solution might be to give every

child a trial period in a special education program. If at the end of this time, he has not made any changes, the emphasis should shift to being medical and caretaking in nature, not educational. No more educational dollars should be spent on him and because the child will always be dependent on others for care, it is a misuse of teachers' talent as well as valuable classroom space to continue to try to make the child learn something he is simply incapable of doing.

The consequences are devastating.

It is not only a misuse of money, it raises false hopes in the children's families, and it leads to disillusionment. It results in a burnout in teachers, therapists, and social workers. Even if our schools weren't overcrowded, our teachers overworked, it is inappropriate to make them spend day after day with a child who has little or no ability to benefit and is primarily in need of medical or nursing care.

We seem to have our priorities reversed. Instead of giving a little extra help to children who might benefit educationally, we are giving a lot to those who will not.

After five more years of experience, I can no longer support such totally ineffective effort.

Sincerely,

Lynn Miller, M.Ed., RPT, OTR

The district court, in its findings of fact, agreed with Lynn Miller's current assessment, that Timothy W. cannot benefit from any educational training; that includes "functional" training such as sign language, using the toilet, cooking or dressing or anything else that would increase his independence. He can benefit from a health standpoint from some of the physical therapy. But, the issue here is educational benefit, not medical benefit.

The court of appeals ruled that the district court erred in its conclusion that education is measured by the acquirement of "traditional 'cognitive'

skills." (Emphasis supplied). The district court did not discuss "traditional" cognitive skills. The district court would undoubtedly agree with the court of appeals that education includes "not only traditional academic skills, but also basic functional life skills...." One cannot acquire any skill, regardless of how basic the skill may be, without some level of cognition. Education must lead to volitional, not merely reflexive, behavior.

The court of appeals' list of Timothy's "educational needs" are not educational at all. For example, the court lists several of the "educational needs" recommended by Lynn Miller at the time of trial, which included "postural drainage, motion exercises, sensory stimulation, positioning, and stimulation of head control." Appendix to Petition

for Certiorari, at 3a. Later in its opinion, the court set out another list of so-called "educational needs" from Lynn Miller's report. Id. at 5a.

There is no question that the court of appeals has gone beyond the plain meaning of the statute by expanding the definition of "handicapped children" to include all disabled children regardless of whether they "require special education." As this Court has said in other cases of statutory construction, "if one must ignore the plain language of a statute to avoid a possibly anomalous result, '[t]he short answer is that Congress did not write the statute that way.'" North Carolina Dept. of Transp. v. Crest Street, 107 S.Ct. 336, 341 (1986) (quoting White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451 (1982)). In the instant case

the court by not following the language of the Act is not avoiding an anomaly but is creating one. The district court, however, in reading the definition of "handicapped children" to exclude children such as Timothy W. both complies with the plain language of the statute and with the Congress' intent to fund the education of handicapped children.

2. The court of appeals erred by adopting its own factual findings without ruling that the district court's findings were "clearly erroneous."

The court of appeals opinion states that the court did not review the district court's findings of fact, yet the opinion goes to great pains to cite its own version of the facts to support its position that Timothy W. can benefit from a special education. For example, the opinion distinguishes this case from the case of a child in a coma. If the

court of appeals' ruling of law is correct -- that "all handicapped children" means all children with a disability" -- then school districts also have a duty to serve comatose children.

The court purports to rule that ability to benefit is irrelevant. But, the court's discussion of comatose children indicates that it is actually distinguishing on the basis of cognition, concluding that since comatose children are not conscious of their environment, they are incapable of benefitting from an education. While that is true, it is equally true that a particular child that is not "in a coma" in the technical medical sense, may be equally as incapable of understanding or relating to its environment as a child in a coma. That is a factual issue. The district court found, as a matter of fact, that

Timothy was incapable of benefitting from special education because he can acquire nothing more than the "highest level of reflex behavior" which he has already attained. The court of appeals in effect amended the district court's findings of fact. That determination was in error unless the findings of the district court were "clearly erroneous."

3. In failing to distinguish between "special education" and "related services" the court of appeals ignored this Court's interpretation of those terms and set precedent that may result in a substantial increase in the cost of serving handicapped students.

The question of whether a child requires special education is also crucial to a determination of whether "related services" are required to be provided. Section 1412(1) of the EAHCA requires states to assure that all "handicapped children" are provided a "free appropriate public education,"

which is defined in § 1401(18) to include "related services." The primary concern of Amici in this case is that the interpretation of the court of appeals, if followed by other courts, will result in a substantial expansion of the obligation of school districts to provide "related services." If it is indeed irrelevant whether a handicapped child can benefit from education, then the school district must provide whatever health and social services the child needs, regardless of whether they relate in any way to education.

Section 1401(17) of the EAHCA defines "related services" as:

transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for

diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. (Emphasis supplied.)

This Court addressed the issue of the scope of the obligation to provide "related services" in its decision in Irving Independent School District v. Tatro, 468 U.S. 883 (1984). In that case the school district was providing special education services to the child, but the district refused to provide "clean, intermittent catheterization" as a "related service." In a unanimous opinion, the Court held that C.I.C. was a "related service" because the child could not benefit from her special education in the least restrictive environment without it. The key in that case was that the child required special education for a

speech impairment and could not attend her special education classes unless C.I.C. was administered to her during the school day. The Court acknowledged that the "related services" requirement surfaces only where the child is receiving special education.

To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U.S.C. § 1401(1); 34 CFR § 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 CFR § 300.14, Comment (1) (1983).

Id. at 894.

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N.W.2d 59 (Mich. Ct. App. 1982).

Where courts find it difficult to determine if a service is educational or to separate educational and "related services," they find that the school district must provide all of the services.

It may be possible in some situations to ascertain and determine whether the social, emotional, medical or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.

North v. District of Columbia Bd. of Educ., 471 F. Supp. 136, 141 (D.D.C. 1979).

If the ability of a student to benefit from educational services is indeed irrelevant, then the court need

not even make an attempt to assign responsibility for providing services. The schools will be required to provide all health-related, emotional and psychological services to disabled children regardless of the relationship of the service to education.

A New York case exemplifies this issue. The case involved a nine year old child who had developed barely beyond the four month level. Her parents sought a service described as "feeding therapy." The state reviewing authority reversed the local hearing officer's decision which required the district to provide the service as a "related service." The reviewing authority held that "related services" are not required to be provided in absence of an educational program.

In view of the lack of an educational prescription for this child in the IEP, the hearing officer erred as a matter of law

in concluding that petitioner must provide feeding therapy as a related service. Such a service might properly constitute a related service if it were necessary to enable a child to stay in a particular facility or program and thereby benefit from special education. However, that is not the case in this appeal....

[I]f petitioner should conclude upon further review that the child's current physical condition is such that there is no educational program appropriate for the child, then there would be no obligation to provide related services. Petitioner must undertake such a review and determine whether an educational program can be provided.

Case No. 10571, (June 19, 1981) 3 EHLR 502:315, 316.

Although the court of appeals is correct that Timothy W. does not seek residential placement in this case, that is not the usual situation in cases involving profoundly retarded children. For example, the plaintiffs in most of the cases cited in the court of appeals

decision sought residential placement rather than education in a day setting. See, e.g., Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985); Abrahamson v. Hershman, 701 F.2d 687 (1st Cir. 1983); Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981); Gladys J. v. Pearland ISD, 520 F.Supp. 869 (S.D. Tex. 1981); Matthews v. Campbell, 3 EHLR 551:264 (E.D. Va. 1979); North v. District of Columbia Board of Education, 471 F.Supp. 136 (D.D.C. 1979). In most cases involving children like Timothy W. the expense incurred by the school district will include not only the so-called "educational" services (which Amici contend are not educational) but also the expenses of residential placement.

The Department of Education has recently issued a report on the cost of

compliance with the EAHCA. The annual report is required by Congress under § 618(f)(1) of Part B of the Education of the Handicapped Act, 20 U.S.C. 1401, 1411 et seq.. The report, "To Assure The Free Appropriate Public Education of All Handicapped Children," is based on surveys of the progress being made in implementing the Act. According to the eleventh annual report published in 1989, which includes data for the 1987-88 school year, the average per pupil expenditure for residential placement and related services was \$31,616 for private placements and \$28,304 for public placements, id. at Table 40, while the average cost of educating a regular education pupil was \$2780, id. at 147. Of the estimated total of \$16 billion in public funds expended on educating handicapped children, id. at 118 (only

six percent of which is funded by the federal government under the EAHCA, id. at 147), ten percent is devoted to "related services," id. at xix. In many cases the district is unable to provide "related services" itself and must purchase the services from outside providers. According to the Department's report, the largest cost component in purchased services was related services (44 percent), id. at 122. The court of appeals decision in this case will increase the devastating financial burden currently being felt by school districts across the country.

CONCLUSION

In the context of a public policy discussion, the argument that society has a moral responsibility to care for any

child as severely handicapped as the Plaintiff, has a great deal of merit. But that is not the issue here. The issue is whether the EAHCA requires this school district to serve this child. That determination should be made through the administrative procedures of the Act, taking into account the educational arguments made by both sides.

It is within the province of the administrative officials to determine, where there is a dispute, not only whether the education proposed in an IEP results in a free appropriate public education in the least restrictive setting appropriate to the needs of the child, but also whether the child is a "handicapped child" within the definition of the EAHCA. That requires a determination of whether there is some reasonable educational goal which could

benefit the child.

The court of appeals has taken it upon itself to ignore the plain language of the statute, to devise its own set of facts in order to make the case that Timothy W. is not analogous to a comatose child and to convert the EAHCA's requirement to provide related services necessary for a handicapped child to benefit from his educational program into a mandate to provide all manner of services without regard to their relationship to educational goals. The court erred in all these respects.

Amici submit that the errors of the court of appeals and the financial implications of the precedent on school districts across the country are significant enough to warrant this Court's intervention.

Respectfully submitted,

Gwendolyn H. Gregory
Deputy General Counsel
Counsel of Record

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APPENDIX

LYNN MILLER

PHYSICAL AND OCCUPATIONAL THERAPIST
9 Orchard Drive • Durham, New Hampshire 03824
(603) 868-7434

August 6, 1989

The Editor
The New York Times
229 West 43rd St.
New York, NY 10036

To the Editor:

Recently the Times published an article regarding the United States Court of Appeals decision that all children must be educated by their public school districts no matter how severe their disability or whether they can show any benefit.

The article described therapists testifying in 1984 that the child (Timothy W.) "could hear, see bright lights and respond to music, touching and talking". I was one of those therapists.

I've changed my mind. I would not testify for him now. It is not what I said at the time that I would change for it is still an accurate statement. Timothy W. can still hear sound, see bright lights and respond to touch. That is all he could do then, and that is all he can do now, even after five years of daily exposure to teachers, therapists and special education programs.

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The POTENTIAL FOR CHANGE is what is important to determine when recommending that a child receive educational services. This means that the child must have sufficient mental or physical abilities to learn something new. There can be no Individualized Educational Plan for anyone incapable of learning. What is impossible cannot be mandated.

As the article accurately pointed out, it may sometimes be difficult to prove who will thrive and who will not. The solution might be to give every child a trial period in a special education program. If at the end of this time, he has not made any

changes, the emphasis should shift to being medical and caretaking in nature, not educational. No more educational dollars should be spent on him and because the child will always be dependent on others for care, it is a misuse of teachers talent as well as valuable classroom space to continue to try to make the child learn something he is simply incapable of doing.

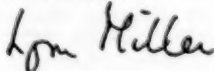
The consequences are devastating.

It is not only a misuse of money, it raises false hopes in the children's families, and it leads to disillusionment. It results in a burnout in teachers, therapists, and social workers. Even if our schools weren't overcrowded, our teachers overworked, it is inappropriate to make them spend day after day with a child who has little or no ability to benefit and is primarily in need of medical or nursing care.

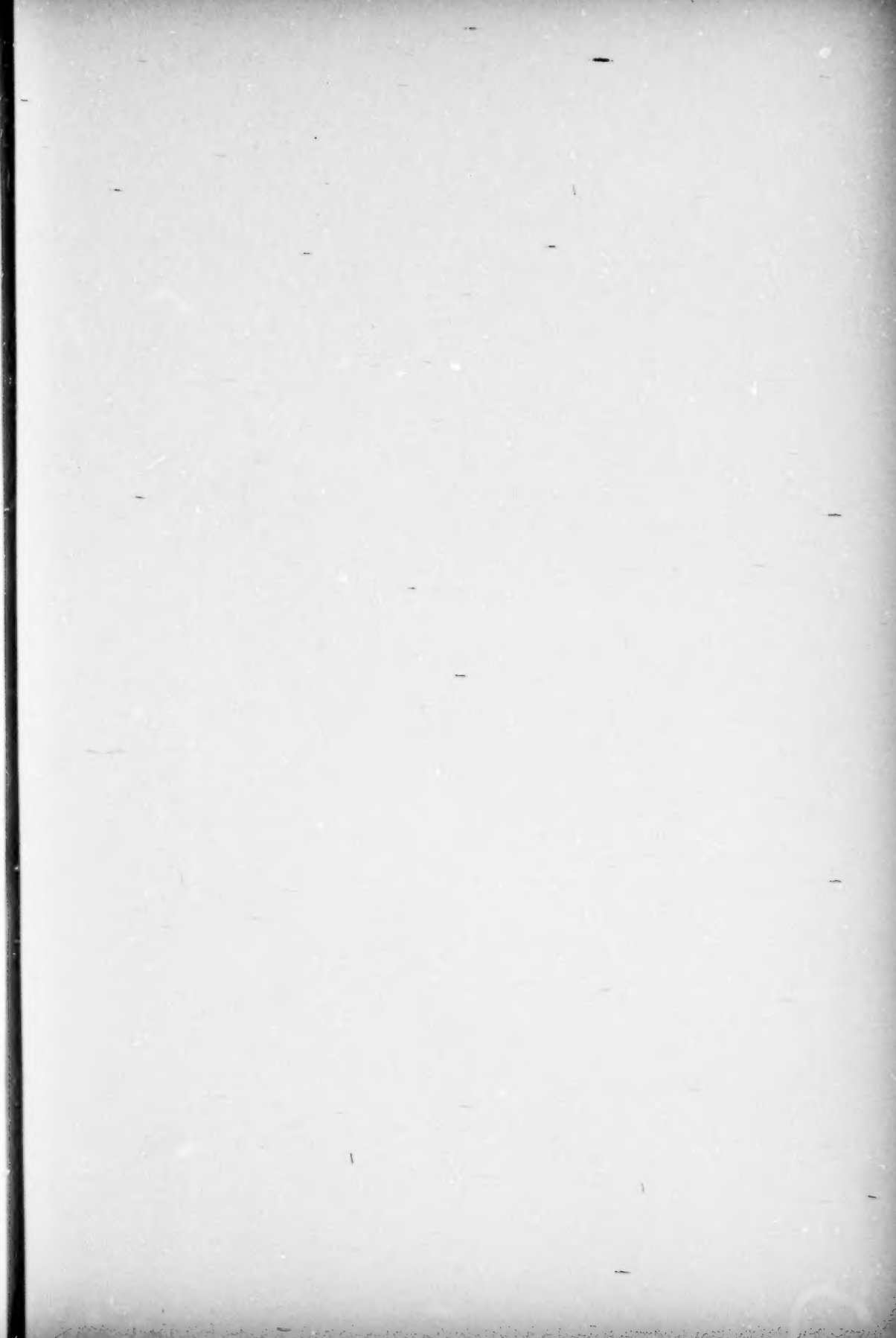
We seem to have our priorities reversed. Instead of giving a little extra help to children who might benefit educationally, we are giving a lot to those who will not.

After five more years of experience, I can no longer support such totally ineffective effort.

Sincerely,

A handwritten signature in cursive script that reads "Lynn Miller".

Lynn Miller, M.Ed., RPT, OTR



IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS MOTHER
AND NEXT FRIEND, CYNTHIA W.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR PETITIONER

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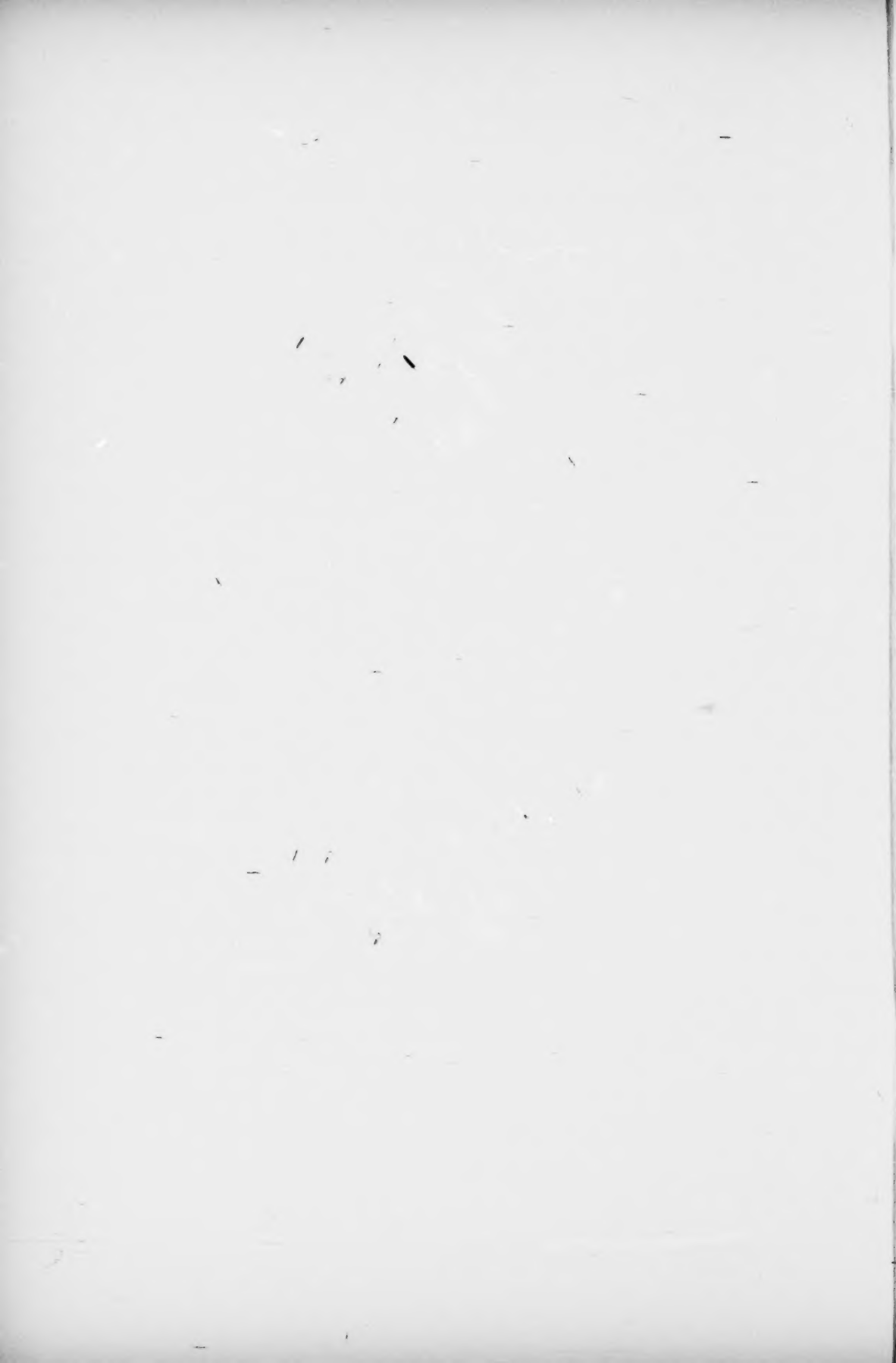
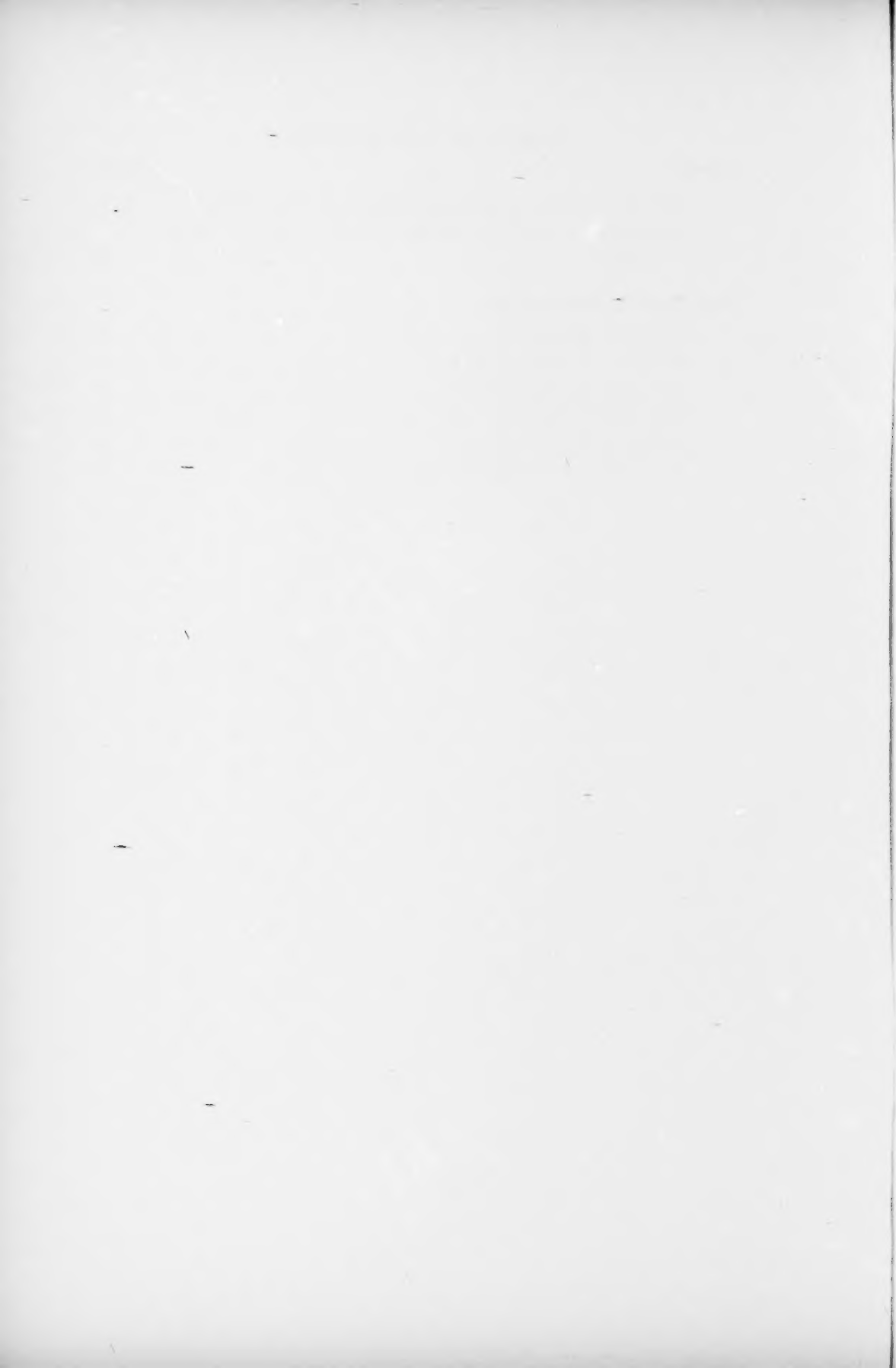


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IN THE
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Respondent, much like the court of appeals before him, responds to petitioner's position by linking two arguments: *first*, that he would, in fact, benefit from education; and *second*, that Congress therefore would not have been unreasonable in incorporating the view that *all* children could benefit from education into the Education for All Handicapped Children Act ("EAHCA"). When these arguments are uncoupled, however, as they must be, it becomes apparent that respondent's view of the statute cannot stand. This case involves a child who was found—based on actual attempts at education as well as a lengthy medical history—to be incapable of benefiting from educational services. Congress did not intend that costly educa-

tional programs be provided to such children during the eighteen years of schooling covered by the EAHCA.

1. Respondent starts with a lengthy, one-sided review of the evidence in an attempt to support his claim that "he has educational needs, and that he can benefit from education." Brief in Opposition ("Opp.") at 2. But the district court squarely found otherwise, concluding that "Timothy W. is not capable of benefitting from special education." Pet. App. 57a. This finding was based on a comprehensive factual record and did not, as respondent suggests, rest on a matter of "one's personal philosophy of education." Opp. at 5 n.2. On the contrary, in addition to the exhaustive information about respondent's medical history, the district court had before it, and relied on, extensive evidence concerning the fifteen months immediately prior to trial in which petitioner had made elaborate efforts to train and educate respondent, without having achieved any success whatsoever. See Pet. at 5-6. These are not pleasant facts to contemplate or findings to make, as the district court candidly acknowledged. See Pet. App. 57a. But they are nevertheless the findings in this case and, not having been disturbed on appeal, they form the factual predicate for this Court's consideration of the legal issues presented by the petition. See, e.g., *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2623 (1987).

2. Starting from a proper factual predicate, therefore, the issue in this case is not, as respondent would have it, whether Congress intended to exclude from coverage under the EAHCA "a child considered by the *education agency* to be too severely handicapped to benefit from educational services." (Opp. at Questions Presented) (emphasis added). Rather, the question is what the EAHCA requires when, *based on actual attempts at educating a particular child, a court properly finds that the child cannot benefit from such education.*¹ As to that question, re-

¹ Indeed, acknowledging a strong preference for inclusion of children under the coverage of the EAHCA, petitioner argued below

spondent has little to say other than to reiterate the EAHCA's persistent use of the language "*all* handicapped children." Opp. at 12-13. As we explained in our petition, however, simply as a matter of interpreting the "plain language" of a statute on which respondent claims to place primary emphasis, the significance of the word "all" in the EAHCA depends, in turn, on the interpretation of the definition of the word "handicapped"—a definition that expressly limits statutory coverage to children who "*require* special education and related services." 20 U.S.C. § 1401(a)(1) (emphasis added). See also 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A) (states must include only children who "*are in need* of special education") (emphasis added).² Moreover, respondent says absolutely nothing about the other statutory limitation that we argue is included in the EAHCA: *i.e.*, that it provides "*a free appropriate public education.*" 20 U.S.C. § 1400(c) (emphasis added). That statutory language likewise makes clear that children who are shown to be incapable of benefiting from education are not covered since, as to them, there is *no* education that is "appropriate." Cf. *Board of Educ. v. Rowley*, 458 U.S. 176, 200-01 (1982).

In addition to placing heavy reliance on the use of the word "all," respondent quotes extensively from the legislative history of the EAHCA, including testimony by interested witnesses stating that every child is educable. Opp. at 14-15. As an initial matter, such legislative history provides an insufficient basis to engraft a mandatory fed-

that the burden should be placed on the school district to show that a particular individual was incapable of benefiting from educational services. Pet. App. 51a.

² Respondent asserts that this limitation in the statute should be read as "impos[ing] an upper limit on who is eligible for *special* education." Opp. at 13 n.8 (emphasis in original). But there is certainly nothing in the "plain language" of the statute—so heavily relied on by respondent and the court below when it came to the word "all"—to suggest such a limitation on the words "require" and "need."

eral funding requirement on participating States, a dispositive legal objection that respondent does not even address. See Pet. at 14-15; Br. *Amici Curiae* of The National League of Cities, *et al.* In any event, while the statements that are cited may reflect the general beliefs of various witnesses and even individual legislators, they simply do not answer the question whether Congress intended to insist that States provide educational services to children who are shown, based on experience, to be incapable of benefiting from such services. It seems highly unlikely that Congress would have imposed such a requirement, and respondent and the court of appeals have pointed to no legislative history that convincingly demonstrates otherwise. Indeed, as we noted in our petition, the interpretation of the EAHCA advanced by respondent and the court below would mandate educational services even for a child in a coma—a position that both respondent and the court expressly disavow, but without providing any basis in the statutory language or legislative history for so doing. See Opp. at 11 n.5; Pet. App. 32a.

These difficult issues cannot be avoided by the States and school districts throughout the country which, like petitioner, are being required to provide costly educational services even when they are shown to have no effect. Given the fact that such requirements divert resources from students who do benefit from educational services, it is difficult to accept the proposition that Congress, by the very general language relied on by respondent, meant to impose such a futile obligation. As this Court explained in a related context under the EAHCA, “[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.” *Board of Educ. v. Rowley*, 458 U.S. at 200-01.³

³ Respondent seeks to avoid the force of this conclusion by asserting that “it is not an exercise in futility for Congress to determine that school districts are obligated to *attempt*, at least, to benefit all

3. Respondent further argues that this case does not merit review because the "decision below affects only a few states and school districts." Opp. at 28. The argument is belied by the filing of two *amicus curiae* briefs on behalf of seven national governmental organizations in support of the petition. The first brief, by the National League of Cities, *et al.*, underscores both the practical and the doctrinal significance of the case to several major associations of state, county and municipal governments, which assert that it is "of exceptional importance" because, *inter alia*, "[t]he First Circuit's decision threatens to throw askew the delicate balance of federal-state relations in an area of historical local concern." Motion for Leave to File Brief at 4 (pages unnumbered). The second *amici* brief, by the National School Boards Association and the American Association of School Administrators, emphasizes the importance of this case to local school districts in particular, by concluding that "the errors of the court of appeals and the financial implications of the precedent on school districts across the country . . . warrant this Court's intervention." Br. at 36.⁴

its handicapped students." Opp. at 17 (emphasis in original). Whatever merit that argument might have in another case, it is inapplicable here because petitioner made such an attempt without being able to achieve any success. Respondent does not suggest, nor could he, that the educational programs afforded him were inappropriate or incomplete.

⁴ The National School Boards Association and the American Association of School Administrators emphasize, in their amici brief at page 19, that the Court of Appeals decision raises an important national issue by blurring the distinction between special education and related services under 20 U.S.C. § 1401(a)(16) and (17). The Respondent replies that, although physical therapy and occupational therapy are ordinarily considered related services, federal law allows a state to treat related services as special education if they contain an instructional element. Opp. at 25. However, the Respondent neglects to mention that under New Hampshire law physical therapy and occupational therapy are related services, not special education. N.H. Code Admin. R., Ed. 1101.10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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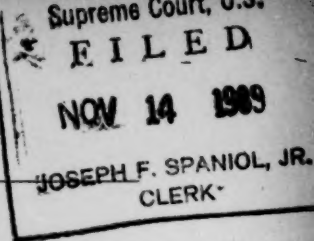
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

**OBJECTION TO THE MOTION FOR LEAVE TO FILE
AN AMICI CURIAE BRIEF OF THE NATIONAL
SCHOOL BOARDS ASSOCIATION AND THE
AMERICAN ASSOCIATION OF SCHOOL
ADMINISTRATORS, OR IN THE ALTERNATIVE,
MOTION TO STRIKE PORTIONS OF AMICI'S BRIEF.**

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**1. On September 30, 1989, a Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit was**

filed in this case. The Petition sets out the following two questions for review:

a. Whether the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400 *et seq.*, requires participating States and local school districts to provide educational services to children whose mental incapacity renders them unable to benefit from such services.

b. Whether a State's obligations under the Education for All Handicapped Children Act may be significantly expanded by transforming "related services" — such as physical and occupational therapy — into educational services, which are entitled to far broader statutory coverage.

2. On or about October 30, 1989, the National School Boards Association and the American Association of School Administrators filed a motion for leave to file a brief as *Amici Curiae*, and a brief in support the Petition for Writ of Certiorari in this case.

3. In their brief, *Amici* argue that the Petition should be granted because the court of appeals erred in adopting its own factual findings without ruling that the district court's findings were clearly erroneous. Brief of *Amici*, National School Boards Association *et al.* at 17. Contrary to the rules of this Court (Rules 21.1 (a) and 15.1 (a)), however, this issue is not fairly included in the Questions Presented by the Petitioner.

4. In addition, in an effort to buttress their argument that the court of appeals erred in its factual conclusions, *Amici* also reproduce, in total, in the body of their brief a copy of a letter dated August 6, 1989 sent by Lynn Miller to *The New York Times*. Lynn Miller testified at the preliminary injunction hearing in 1984 in this case. Her testimony and reports are, therefore, part of the record in this case. App. I, 45-53.

5. This letter was not published by *The New York Times*. This letter is not part of the record in this case.

6. It was improper for the National School Boards Association and the American Association of School Administrators to attach to their brief and cite evidence that is not part of the record in this case. *Adickes v. Kress & Co.*, 393 U.S. 144, 157-58 n.16 (1970); *Johnson v. United States*, 426 F.2d 651, 656 n.8 (D.C. Cir. 1970).

WHEREFORE, Respondent respectfully requests that this Court:

A. Deny the National School Boards Association and the American Association of School Administrators motion for leave to file a brief as *Amici Curiae* in this case.

B. In the alternative, strike *Amici's* argument, beginning on page 17 and ending on page 19 of their brief, that the court of appeals erred by adopting its own factual findings without ruling that the district court's findings were clearly erroneous in this case.

C. Grant such other and further relief as may be deemed just and appropriate.

Respectfully submitted,

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